IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1676

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION and CONTINENTAL TELEPHONE CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners United States Independent Telephone Association and Continental Telephone Corporation[1] respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the March 22, 1977 judgment of that court in this case.

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[1] United States Independent Telephone Association (USITA) is the national trade associaton of the approximately 1,600 "Independent" (not owned by or affiliated with the American Telephone & Telegraph Company) telephone companies in these United States. The Independents serve over half the served geographical area of the nation with over 28 million telephones and almost $23 billion in telephone plant.

Continental Telephone Corporation, a member of USITA, owns and operates 44 telephone companies in 41 states, serving over 2 million telephones in predominantly rural and suburban areas.

JUDGMENT BELOW

The decision of the Court of Appeals, not yet officially reported, appears at Appendix A to the American Telephone & Telegraph Company petition for certiorari in this case.* The decisions of the Federal Communications Commission, affirmed by a divided panel of the Court of Appeals, appear at AT&T Appendices B, C, D, E and F.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1977. Timely motions pursuant to Rule 41(b), Federal Rules of Appellate Procedure, for stay of mandate were granted by order filed April 28, 1977. This petition, filed within the 30 day period prescribed in Rule 41(b), invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented by this petition seriously affect the jurisdiction of the Federal Communications Commission, the jurisdiction of utility regulatory commissions of the 50 States and the District of Columbia, the operations of the more than 1600 telephone companies of the United States, and the furnishing of several million telephone instruments and other tele-

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* To avoid duplication and an unnecessary burden to the Court, petitioners USITA and Continental will refer herein to the separately bound AT&T Appendix as "AT&T App."

Petitioners have included herein the Recommended Second Report and Order of the Federal/State Joint Board in FCC Docket No. 19528, not published by FCC, which will be cited "App."

phone terminal equipment to every resident in this nation. These questions are:

1. Where a Federal statute prohibits Federal regulations of local matters, whether the Fourth Circuit Court of Appeals erred in finding plenary and preemptive jurisdiction in the Federal Communications Commission to regulate the furnishing of telephone instruments.

2. Whether the Court of Appeals erred in affirming a Federal Communications Commission ordered massive and pervasive restructuring of the domestic telephone industry, grounded only on the theory that competition is good and will result in no technical harm to the telephone network.

STATUTES INVOLVED

The statutory provisions involved, Sections 1, 2, 201-205, 214 and 221(b) of the Communications Act of 1934 (47 U.S.C. §§ 151, 152, 201-205, 214, and 221(b) are set forth in AT&T Appendix H.

STATEMENT OF THE CASE

This case had its genesis in the issuance by the Federal Communications Commission in June, 1972 of a "Notice of Inquiry, Proposed Rulemaking, and Creation of Federal-State Joint Board" instituting, the Commission's Docket No. 19528.[2] At issue in this docket was whether there should be ". . . a basic and substantial change in the nature of" interstate and foreign telephone services which would allow telphone company customers to furnish a part of the services.

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[2] *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539 (1972).

As the Commission noted, "MTS [message telephone service] and WATS [wide area telephone service] have been and are now offered only as complete services that include the furnishing of the telephone instrument."[3]

In recognition of the "basic and substantial change" in telephone service to be considered and the potential impact of that change on local telephone exchange services, because the same telephone is used for both interstate and local services, the Commission concluded that "we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services."[4] The proceeding was therefore referred to a "Federal-State Joint Board", a Board consisting of selected FCC Commissioners and State regulators, pursuant to Section 410 of the Communications Act. The Board in essence has the authority of an administrative law judge, *i.e.*, it issues an "initial" or "recommended" decision, subject to the review by the F.C.C., in whose deliberations the State members of the Board may participate but not vote.

In April, 1973 the Commission issued a "First Supplemental Notice" in its Docket No. 19528,[5] requesting comments on several technical proposals for direct con-

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[3] *Ibid.*

[4] *Id.* at 541.

[5] *Interstate and Foreign MTS and WATS*, 40 FCC 2d 315 (1973).

nection to the telephone network of customer-provided equipment, including a "registration" program developed by the Commission's own Office of Chief Engineer. These proposals were advanced as providing a means for protecting the telephone network against physical harm, *e.g.*, hazardous voltages; and in its First Supplemental Notice the Commission expressly limited the scope of its proceeding to the feasibility of a program of technical standards from "a technical, engineering, operational and administrative standpoint. . . ."[6] Sharpening the intent of this limitation, the Commission announced ". . . we are not considering at this time questions as to whether or to what extent there may be any adverse economic or environmental consequences from the ultimate adoption of any of these proposals. We shall cover such issues in an appropriate manner by further supplemental notices in the near future."[7]

No further supplemental notices were issued in the Joint Board case. The Commission, however, did institute its Docket No. 20003 inquiry, *Customer Inter-*

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[6] *Id.* at 318.

[7] *Ibid.* Although the environmental consequences of customer provision of telephones were and remain obscure, the relevance and substantiality of economic consequences were well understood by F.C.C., being termed "fundamental" by the Commission itself (*Customer Interconnection*, 46 FCC 2d 214, 217 (1974)), "a highly crucial element" by FCC Chairman Wiley (House Appropriations Committee Hearings, March 12, 1974, Tr., p. 4), and "integral to a fair resolution of the [Federal-State Joint Board] proceeding" by then FCC Chairman Burch (Letter to NARUC Communications Committee Chairman Wiggins, August 4, 1972, quoted in Joint Board Recommended Second Report and Order, — FCC 2d — (1976)) (App. 10a).

connection (46 FCC 2d 214 (1974)), a new and separate Federal proceeding of its own, withheld from the Federal-State Joint Board consideration, which had as one of its "fundamental purposes . . . to explore fully the effects on the costs and availability of basic local telephone exchange services of . . . the regulatory actions we are urged to take by many parties in Docket No. 19528" (*Id.* at 217). Comments and studies in this proceeding are still being filed with the Commission.

The Federal-State Joint Board proceeding in F.C.C. Docket No. 19528, initially phased as described and eventually bifurcated by establishment of the new Docket No. 20003 Federal only inquiry into the economic consequences of regulatory action contemplated in Docket No. 19528, thus became devoted solely to technical matters. As now described by the Commission, "From its inception, Docket No. 19528 has been concerned solely with the question of technical harm." [8]

Disturbed by the FCC's apparent preoccupation with the single question of technical harm, and its apparent unwillingness to address the broader question of the economic consequences of its contemplated action or to allow joint Federal-State exploration of those consequences, several State utility commissions and the National Association of Regulatory Utility Commissioners (NARUC) began investigations of their own. Concerned over potential State intrusion into what FCC apparently considered a Federal preserve, the FCC in February 1974 asserted in its *Teler-*

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[8] *Interstate and Foreign MTS and WATS*, Second Report and Order, March 18, 1976, 58 FCC 2d 736, 739 (AT&T App. 7c).

ent Leasing decision[9] that it could and did preempt State regulatory action that might derogate or conflict with Federal rulings.

The effect of the *Telerent Leasing* decision—suspension of pending action by individual State regulatory bodies—did not extend, however, to the NARUC investigation, which produced an extensive report concluding that FCC policies would impose additional cost burdens on local residential and business telephone users amounting to $360 million to $740 million annually by 1980 and $900 million to $1 billion annually by 1984. *(Report of NARUC Committee on Communications, 1974).*

On May 27, 1975 the FCC released and requested comments on the "Recommended First Report and Order" in Docket No. 19528, adopted by the Joint Board on April 24, 1975.[10] This document contained the Joint Board's recommendation that a Federal pro-

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[9] *In re Telerent Leasing Corp.*, 45 FCC 2d 204 (1974); aff'd. *sub nom. North Carolina Utilities Commission, et al.* v. *FCC*, 537 F.2d 787 (4 Cir. 1976); *cert. den.*, — U.S. — (1976).

Pertinent to the FCC single issue approach in its Docket No. 19528 proceeding is the Commission's *Telerent* statement that:

> "In light of representations made to us in connection with the instant proceedng, we propose to broaden our review of potential adverse effects to include alleged economic effects which may result from currently permitted use of customer-provided equipment." (45 FCC 2d at 222).

[10] *Interstate and Foreign MTS and WATS*, 53 FCC 2d 219 (1975). In concurring statements, three State members of the Joint Board expressed doubt concerning FCC authority to implement the program and concern over its impact on quality of service; the fourth State member was troubled by the inclusion of telephone company-provided equipment, terming this aspect "burdensome and costly to the utilities, ultimately resulting in higher rates to all telephone subscribers;" and "a direct assault upon the responsibilities of state regulatory commissions" (53 FCC 2d 260-261).

gram be established under which certain telephone terminal equipment meeting specified technical standards could be directly connected to the telephone network. Specifically excluded from the recommended program were main telephones, extension telephones, key telephones, and private branch exchanges.

In November 1975 the FCC First Report and Order was issued.[11] It established a Federal registration program, essentially the proposal of the Commission's Chief Engineer, including telephone company-provided equipment and extension telephones. In it, the Commission expressed the tentative view that "there is no valid distinction as to the potential for harm from any of the excluded classes of devices,"[12] but asked for further comment on the "planned inclusion of PBX's, key telephone systems and main station telephones in our registration program."[13] The Commission also reiterated its determination to exclude economic consequences from its deliberations in Docket No. 19528, stating that "The present decision relates only to the requirements which interconnected devices must satisfy in order to avoid technical harm to the telephone network," but promising consideration of economic effects in its separated Federal-only Docket No. 20003 proceeding.[14]

On March 3, 1976, the Federal-State Joint Board issued its "Recommended Second Report and Order".[15]

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[11] *Interstate and Foreign MTS and WATS*, 56 FCC 2d 593 (1975) (AT&T App. B).

[12] 56 FCC 2d at 600 (AT&T App. 13b).

[13] *Id.* at 626 (AT&T App. 37b).

[14] *Id.* at 600-601 (AT&T App. 14b).

[15] *Interstate and Foreign MTS and WATS*, — FCC 2d — (1976) (App. A).

In that document, the Joint Board concluded that main telephones, key telephones and PBXs should not be included in a Federal registration program before the economic consequences of that proposed action had been considered and evaluated. Pointing to the several FCC utterances giving assurance that economic impact was a critical issue and one to be resolved originally in Docket No. 19528, prior to final decision on a Federal registration program, the Joint Board emphasized that "Therefore, we cannot conclude that the proposal before us is in the public interest solely on the basis that the implementation of the proposal would not result in technical harm to the telephone network." [16]

One of the Federal members of the Joint Board concurred in the Recommended Second Report and Order. The other two Federal members, dissenting, attached to their dissent a draft report and order prepared by the Commission's Common Carrier Bureau.

Fifteen days later, on March 18, 1976, the Bureau draft, with minor editorial revisions, became the FCC Second Report and Order,[17] with two FCC Commissioners dissenting. In this Second Report and Order the FCC essentially ignored the recommendations of the Joint Board, except to again reiterate that the economic consequences of the adoption of the Docket No. 19528 Federal registration program "do not fall

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[16] —FCC 2d — (1976) (App. 5a).

Also of decisional significance to the Joint Board was the principle that increased competition, while a pertinent factor, not be equated with the public interest (citing *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Telephone Company* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974)) (App. 5a-6a).

[17] *Interstate and Foreign MTS and WATS*, 58 FCC 2d 736 (1976) (AT&T App. C).

within the scope of the Docket No. 19528 proceedings." [18] The FCC therefore ordered its registration program into effect and terminated the Docket No. 19528 proceedings.

Petitions for review of the FCC orders, timely filed by Petitioners herein, by other telephone companies and by State utility commissions, were consolidated in the United States Court of Appeals for the Fourth Circuit.

Motions for stay of the FCC orders, summarily rejected by FCC, were granted by the court in April 1976. In June 1976 the court modified its stay to permit the FCC registration program to become effective as to "data and ancillary" equipment, *e.g.*, telephone answering and recording devices; but maintained the stay in full effect with regard to telephones (both main and extension), key telephones, PBXs, and all telephone company-provided equipment.

The court's decision on the merits (Circuit Judge Widener dissenting), filed on March 22, 1977, found plenary jurisdiction in the FCC to regulate all interstate communications services and facilities and all facilities used jointly for the furnishing of interstate and local communications services. The decision concludes that when Congress said "Nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications practices, services, facilities or regulations for or in connection with intrastate communication service," [19] it did not mean "Nothing", but rather meant that the

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[18] *Id.* at 739 (AT&T App. 7e).

[19] Communications Act of 1934, Section 2(b)(1); 47 U.S.C. 152 (b)(1) (AT&T App. 1h-2h).

Commission shall have total jurisdiction over all facilities used for both interstate and intrastate services.

Rejecting Petitioners' arguments that the quoted statutory language reflected repeated expressions of Congressional intent to preserve state regulatory authority over predominantly local matters, the court found in essence that jointly used facilities must be classified for jurisdictional purposes as "interstate" facilities subject to FCC jurisdiction. Reserved to the States, according to the court, are only those facilities "separable from and . . . not substantially affect[ing] the conduct or development of interstate communications" (citing *North Carolina Utilities Commission* v. *FCC,* 537 F.2d at 793) (4 Cir. 1976).[20]

In the decision below, the majority opinion also found in "the very purpose of agency delegation—institutionalization of authority to fashion policies and programs that implement broad legislative mandates in presently unforeseeable circumstances"[21] ample authority to support FCC promulgation of an all inclusive registration program. In this context, and with specific reference to the inclusion of telephone company-furnished equipment, the court also found authority in the Commission under Section 205 of the Communications Act (47 U.S.C. 205), which empowers the Commission to prescribe just and reasonable charges and practices if it finds existing charges unjust and unreasonable.[22]

Turning to Petitioners' contentions that the FCC was required to consider the economic consequences

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[20] *Slip op.*, p. 18 (AT&T App. 14a).

[21] *Slip op.* pp. 34-35 (AT&T App. 25a).

[22] *Slip op.*, p. 36 (AT&T App. 26a).

of its action before it acted, the majority of the court below found no warrant for upsetting the Commission's conclusion that "program costs" would be "minimal",[23] and found that "no general principle of administrative law forces all agencies to conduct exhaustive economic impact studies before taking action."[24] Again relying on the Commission's Section 205 authority, this time to a far greater degree, the court's opinion concludes that requiring "a full-scale economic inquiry" before Commission action would be inconsistent with the Section 205 power to prescribe new practices and regulations when existing practices and regulations are found to be unlawful.[25] The court below also noted with approval the Commission's continuing economic inquiry in FCC Docket No. 20003, and expressed satisfaction, based on "our own analysis of the potential impact of the registration program," with the Commission's "operational assumption" that its registration program will have minimal economic impact.[26]

Judge Widener, dissenting, found the FCC orders under review arbitrary, capricious and an abuse of discretion, primarily because of the Commission's refusal to consider serious and unrefuted evidence of adverse economic impact. In Judge Widener's view the Commission also erred in including carrier provided equipment, since the only rationale offered by the Commission was the equalization of competition between competitors.

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[23] *Slip op.*, pp. 38-40 (AT&T App. 27a-29a).

[24] *Slip op.*, p. 45 (AT&T App. 32a).

[25] *Slip op.*, pp. 46-47 (AT&T App. 32a-34a).

[26] *Slip op.*, p. 49 (AT&T App. 34a-35a).

REASONS FOR GRANTING THE WRIT

In constructing its own rationale in support of the Commission's orders, an exercise in judicial activism that permeates the majority opinion below, the court has not only overstepped the well established bounds of judicial review,[27] but has also compounded the grievously flawed FCC decision and brought its own decision on important issues of Federal law into conflict with controlling decisions of this Court and decisions of other Courts of Appeal.

I. WHETHER CONGRESS GRANTED THE FEDERAL COMMUNICATIONS COMMISSION AUTHORITY TO REGULATE THE FURNISHING OF TELEPHONES IS A SIGNIFICANT FEDERAL/STATE JURISDICTIONAL ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

The result-oriented decisions of the Federal Communications Commission and the majority opinion of the court below would establish as a principle of law that any continued State regulation of intrastate and local telephone service ". . . is by grace of the Federal Communications Commission, not by act of Congress . . . ."[28]

The Federal intrusion into the telephone service area regulated by the States for over 70 years, with State authority being recognized and acknowledged by FCC

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[27] No principle of judicial review of agency action is more firmly established than that an agency decision must be judged on the basis of agency action and agency rationale, not on what a reviewng court thinks the agency should have done or said. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 169 (1962); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

[28] *North Carolina Utilities Commission, et al.* v. *FCC*, 537 F. 2d 787, 799 (4 Cir. 1976), Judge Widener, dissenting; *cert. den.*, — U.S. — (1976).

during the first 40 years of that Commission's existence, reflects the typical pattern of step-by-step encroachment common to creeping Federalism. The first step, a relatively abstract assertion of Federal supremacy over connection of telephone terminal equipment without immediate practical consequences, was taken by FCC in 1974.[29] Bootstrapping on this assertion, and without further discussion of the jurisdictional issue, the FCC next promulgated its terminal equipment registration program, the subject involved in the instant case below.

Next, with but limited discussion of the jurisdictional issue, the FCC declared that the state regulatory Commissions of California and Oklahoma could not deny carriers authority to provide *intrastate* telephone service where FCC had authorized the carriers to provide *interstate* service.[30] And continuing its belatedly instituted separate inquiry into the economic impact of its equipment registration program, the FCC announced its intention to investigate regulatory measures to minimize the economic impact of its program, including "unbundling" of State regulated rates for local telephone service and establishment of separate rates for terminal equipment and "network access" service.[31] Additionally, the FCC has published 88 pages of new regulations specifying the technical require-

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[29] *In re Telerent Leasing Corp.*, 45 FCC 2d 204 (1974); *aff'd. sub nom. North Carolina Utilities Commission et al.* v. *FCC* 537 F.2d 787 (4 Cir. 1976); *cert. den.*, — U.S. — (1976).

[30] *AT&T*, 56 FCC 2d 14 (1975); pet. for review pending *sub nom. California* v. *FCC*, D.C. Cir. No. 75-2060 *et al.*

[31] *Customer Interconnection*, 61 FCC 2d 766, 869-870 (1976).

ments for "standard" plugs and jacks to be used for connection of telephone terminal equipment.[32]

This Federal jurisdictional empire has been created in the face of a dual Congressional admonition that "*nothing*" (emphasis supplied) in the Communications Act of 1934 "shall be construed to apply or to give the Commission jurisdiction with respect to . . . facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier," [33] or "for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication. . . ." [34]

Both the Congressional language and the Congressional intent are clear, as indeed were the readings of these sections and the understanding of the intent of Congress by the Commission itself prior to 1974.

As noted above, the furnishing of local telephone service, including provision of the telephone itself, was subject to State certification and regulation for over 25 years prior to the enactment of the Communi-

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[32] 41 Fed. Reg. 28694-28782. In this connection, could it be seriously urged that the Federal Power Commission is authorized to prescribe technical standards for the ordinary electric wall outlet and electric applicance plugs because some of the electric energy used may have moved in interstate commerce?

[33] Communications Act of 1934, Sec. 2(b)(1); 47 U.S.C. 152 (b)(1). (AT&T App. 1h-2h).

[34] *Id.*, Sec. 221(b); 47 U.S.C. 221(b) (AT&T App. 15h). It is noteworthy that both Sections were amended in 1954 to insure the preservation of State jurisdiction even where service is provided over radio facilities licensed by F.C.C.. The amendments (68 Stat. 63, 64) added the words "or radio" to Section 2(b)(1), and "mobile or point-to-point radio" to Section 221(b).

cations Act of 1934. That statute, largely a combination of provisions taken from the Interstate Commerce Act [35] and the Radio Act of 1927, was designed to provide adequate Federal regulation of interstate and foreign commerce in communication, [36] an activity not subject to effective State control. The Congressional intent was to fill a regulatory gap, not create a regulatory conflict or overlap (78 Cong. Rec. 8822 (1934)).

Responding to repeated expressions of State concern that the to be created Federal communications agency might invade State jurisdiction as did the Interstate Commerce Commission under the *"Shreveport"* doctrine,[37] Sections 2(b)(1) and 221(b) were added to the draft legislation amid repeated assur-

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[35] Under the Mann-Elkins Act of 1910, the Interstate Commerce Commission was originally assigned regulatory authority over interstate communications.

[36] Communications Act of 1934, Section 1 (47 U.S.C. 151) (AT&T App. 1h). Instructive in this regard is the fact that the only facility certification jurisdiction conferred on the new Commission was over new, additional or extended interstate "lines". Excluded from the certification requirement are "local, branch or terminal lines not exceeding ten miles in length." Communications Act of 1934, Section 214(a); 47 U.S.C. 214(a) (AT&T App. 10h-11h). Connecting carriers, as defined in Section 2(b)(2), are not subject to facility certification under Section 214. *Id.*, Section 2(b)(4); 47 U.S.C. 152(b)(4) (AT&T App. 2h). And see *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972) where the court upheld a Commission refusal to assert jurisdiction over construction of a telephone exchange building on the ground that "even if such buildings could be considered part of a 'line within the meaning of Section 214(a),[5] an exercise of jurisdiction would still be precluded by Section 221(b)[6]" (464 F.2d at 803) (footnotes omitted). See also *NARUC* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976) (FCC cannot preempt State regulation of two way intrastate communication for hire offered by CATV systems).

[37] *Houston, E. & W. T. Ry.* v. *U.S.*, 234 U.S. 342 (1912).

ances that the purpose of these provisions was "to protect the State commissions against being overriden by this Commission, as the Interstate Commerce Commission has overriden some of the railroad State Commissions."[38] As Congressman Rayburn pointed out, this statute does "not apply to a telephone receiving set, or anything else like that."[39]

This understanding was shared by the Commission. In its 1947 decision in *Recording Devices*, 11 FCC 1033 the FCC concluded that "Accordingly, State and other local regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls" (11 FCC at 1047).

In its 1954 decision in *Jordaphone*, 18 FCC 644, the FCC concluded that interstate tariff restrictions were unlawful "in any community or state in which the use of such answering device with respect to intrastate or exchange telephone service is authorized by appropriate local or state regulatory agencies or commissions" (18 FCC at 671).

In its 1968 decision in *General Telephone Co. of California*, 14 FCC 2d 693, the Commission, rejecting its Common Carrier Bureau's contention that provision of an interstate service facility to a CATV customer subjected the telephone company to full Federal jurisdiction, observed:

> "When the Communications Act was enacted in 1934, *Congress was concerned that the telephone*

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[38] Senate Hearings on S. 2910, 73d Cong., 2d Sess. 179 (1934); see also S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934) (intent was to reserve "to the States exclusive jurisdiction over intrastate telephone and telegraph communications").

[39] House Hearings on H.R. 8301, 73d Cong., 2d Sess. 179 (1934).

> *might be considered an instrumentality of interstate communication merely because of the circumstance that every telephone can be connected with a toll line for interstate calls.* Since the interstate calls of the independent telephone companies were such a small part of their business as to be merely incidental, *Congress agreed with the USITA position that, 'the tail should not wag the dog'; that their telephone facilities should remain under State regulation* because they were essentially local but also to avoid an unnecessary burden to the Commission and the small independent companies." (14 FCC 2d at 696) (Emphasis supplied).

In 1934, interstate calls accounted for only 2% of total calls, a fact of which Congress was well aware.[40] In 1974, interstate messages had increased to 3%.[41] And FCC acknowledgement of its jurisdictional limits continued into 1973, when the then Chairman Burch advised the Congress that the Commission

> ". . . lack[s] primary jurisdiction over telephone sets which are a primary part of the facilities used in providing exchange telephone service. As you know, the Communications Act specifically excluded the Federal Communications Commission from any authority with respect to charges, classifications, practices, services, facilities or regulations for or in connection with intrastate and exchange telephone services of any telephone company; such local service matters are subject to the regulatory authority of State commissions and the various states." 119 Cong. Rec. 30962.

Although the majority opinion of the court below mischaracterizes as "Agency Estoppel" Petitioners' argu-

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[40] 78 Cong. Rec. 10316 (1934).

[41] *In re Telerent Leasing Corp.*, 45 FCC 2d 204, 211 (1974).

ment that the FCC's long continued understanding of and practice under its statute is entitled to significant weight, the majority opinion itself acknowledges, as indeed it must, that "It is true that most practices regarding terminal equipment have historically been regulated by the states, and that the FCC has always formulated its decisions in terms of equipment used for 'interstate communication.'"[42]

Faced with this abundance of legislative language, Congressional purpose and intent, long standing and repeated Commission acknowledgement of its jurisdictional bounds, and even recognition of the historical fact of State regulation by the majority opinion below, how can it be found that the Federal Communications Commission is now authorized to regulate the furnishing of every one of the over 155 million telephones and hundreds of thousands of other items of terminal equipment in the United States?

The Commission orders before the court below on review offer no answer to this question, for they were silent on the jurisdictional issue. The majority opinion below, however, constructed its own rationale on the jurisdictional question, a rationale based in part on the judicially supplied rationale of an earlier majority opinion in *North Carolina Utilities Commission*

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[42] *Slip. op.*, p. 27 (AT&T App. 20a). With greater accuracy, the majority opinion could have observed that the overwhelming majority of FCC decisions have been formulated in terms of *rates* for interstate communication. FCC decisions formulated in terms of *equipment* are few in number, and have either acknowledged or deferred to State jurisdiction (*e.g., Recording Devices*, 11 FCC 1033 (1947); *Jordaphone*, 18 FCC 644 (1954)) or have found interstate purpose and use predominant (*e.g., U.S. Department of Defense* v. *General Telephone Co.*, 38 FCC 2d 803 (1973); AT&T-*TWX*, 38 FCC 1127 (1965)).

v. *FCC*, 537 F.2d 787 (4 Cir. 1976), *cert. den.*, — U.S. — (1976) ("NCUC I"),[43] and in part on a new theory conceived by the majority in this case.

The *NCUC I* rationale, that the statutory prohibition against FCC jurisdiction over intrastate matters should be construed to apply only to intrastate matters "that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications" (*NCUC I*, 537 F.2d at 793) is obviously fallacious. When the Congress desired to extend the scope of the Constitutional commerce clause to activities *affecting* interstate commerce, it could and did so in unmistakable terms.[44] Similarly faulty is the *NCUC I* majority's view that Congressional concern in preserving existing State jurisdiction in its drafting of the Communications Act of 1934 was limited to rates and charges for intrastate communications.[45] As Judge Widener, dis-

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[43] In the earlier *NCUC* case, distinguished from the instant case below (also styled *North Carolina Utilities Commission* v. *FCC*) by use of "NCUC I" and "NCUC II", Senior Circuit Judge Hastie, author of the majority opinion in which he was joined by Senior Circuit Judge Tuttle, died shortly after issuance of the decision. Recusal by all other judges of the Fourth Circuit in both *NCUC I* and *NCUC II* left only Fourth Circuit Judge Widener available to participate in either decision. These judicial disabilities have complicated both cases below by making rehearing most difficult and rehearing *en banc* impossible.

[44] See, *e.g.*, *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 196-198 (1974), where the Court compared the broader coverage under the Fair Labor Standards Act with the "in commerce" applicability of the Clayton and Robinson-Patman Acts. The Communications Act of 1934 applies by its terms only to "interstate and foreign commerce in communication" (Sec. 1), a phrase shortened to "interstate and foreign communication" (Sec. 2) (AT&T App. 1h).

[45] *NCUC I*, 537 F.2d at 793, n.6.

senting, pointed out, "... charges, classifications, practices, [and] services [are] other matters specifically reserved for State regulation by the same statute."[46] Again, had the Congress desired to limit its prohibition to rates for intrastate services, it would have required only draftmanship in its simplest form to accurately and specifically reflect that desire.[47]

Equally erroneous is the *NCUC II* majority's newly devised theory that Petitioners' argument must fall because it "fails to identify those 'intrastate' facilities over which state jurisdiction is to be primary."[48] With all due deference, the majority opinion here approaches the status of a debater's point, for it is not Petitioners' failure to identify intrastate facilities that creates the problem for the majority, but a "failure" on the part of the Congress to anticipate that the word "intrastate", a word that it understood and that was understood and applied by FCC, State commissions, and telephone companies for 40 years after enactment of the Communications Act of 1934 has now become a word of uncertain definition as a result of judicial ingenuity.

It might be that the majority opinion's supplied rationale for FCC assertion of Federal primacy and supreme Federal jurisdiction to prescribe a registration

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[46] *Id.* at 799.

[47] *Puerto Rico Telephone Company* v. *FCC* (No. 76-1134, 1 Cir., decided March 31, 1977) adds little to the *NCUC I* decision. It does hold that a government-owned telephone company is no less subject to FCC regulation than a privately owned company; but it does emphasize the necessity for FCC consideration of adverse as well as favorable consequences of Federal action in determining the public interests (See Point II, *post*).

[48] *NCUC II, slip. op.* at 17 (AT&T App. 14a).

program for telephones and other communications terminal equipment, including wall outlets and appliance plugs, could be an appropriate basis for Congressional action in this area. The fact remains, nevertheless, that Congress has not so acted or enacted; and at issue here is not an abstract question of Federal policy preempting inconsistent State policy, but whether Congress authorized FCC to preempt State jurisdiction over intrastate matters. It is not what Congress could have done, but what it did. And in the Communications Act of 1934 the Congress acted to provide that the Federal Communications Commission shall not have jurisdiction over intrastate matters. And as this Court has said:

> "*It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.'* The command 'thou shall not' is usually rendered as to forbid and we think here it was employed without subtlety and in the usual sense.
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> * * * *
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> Technology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility. Every facility from generator to the appliance for consumption may thus be called one for transmitting such interstate power. By this test the cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state." *Connecticut Light & Power Co.* v. *FPC,* 324 U.S. 515, 528-529 (1945).

The imperative for consideration and determination by this Court of the scope of FCC jurisdiction is emphasized by *Connecticut Light and Power, supra.* In

the instant case Congressional language, Congressional expressions of intent, FCC recognition of and action on its understanding of that language and intent for some 40 years, and court acknowledgment of historical fact, all point to error in the decision below. In *Connecticut Light & Power, supra*, 100% of the use of the toaster on the breakfast table might involve interstate commerce. In this case the use of a telephone for interstate commerce in communications, through switched connection to interstate lines, represents no more than 3% of the total use of the telephone.

Resolution by this Court of the significant question of Federal/State jurisdiction in this case is needed and indeed is critical for the present and future guidance of the Federal commission, State commissions, and the more than 1,600 telephone companies of these United States. Whether the on-going FCC encroachment on State jurisdiction (*supra*, p. 14) is unauthorized and unlawful, as Petitioners respectfully submit it is, can only be determined on plenary review by this Court, review which should be undertaken now before State regulation and the structure of the domestic telephone industry are radically changed by Federal administrative fiat.

II. THE MAJORITY OPINION'S EFFORT TO SUPPLY A FOUNDATION FOR THE ERRONEOUS FCC ORDERS RESULTS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In apparent recognition of the total absence of the essential public interest findings in the decisions of the Federal Communications Commission before it on review, the majority opinion below, as it did on the basic jurisdictional question, once again sought to construct a rationale of its own for affirmance. Once again,

however, the majority's effort runs afoul of decisions of this Court and is in sharp conflict with decisions in other circuits.

A. Protection Against Technical Harm Does Not Equate to the Public Interest.

If one thing is clear in the decisions of the Federal Communications Commission in this case, it is that the only thing of concern to or considered by the Commission was the protection of the telephone network against technical harm. Repeatedly and emphatically was this point made by the Commission. In its First Report and Order in Docket No. 19528, the Commission proclaimed:

> "The present decision related only to the requirements which interconnected devices must satisfy in order to avoid technical harm to the telephone network.[49]

In its Second Report and Order, the Commission again emphasized:

> "From its inception, Docket No. 19528 has been concerned solely with the issue of technical harm. Economic issues, including questions concerning the continued validity of the *Carterfone* decision, are matters which may and are being addressed fully in other proceedings before the Commission without the necessity of delaying the 19528 proceeding.[50]

While regulatory lag is oft complained of and regulatory expedition much sought, expedition is no excuse

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[49] *Interstate and Foreign MTS and WATS*, 56 FCC 2d at 600-601 (AT&T App. 14b).

[50] *Interstate and Foreign MTS and WATS*, 58 FCC 2d at 739 (AT&T App. 7c).

for failure, indeed outright refusal, to consider pertinent public interest issues other than technical harm.[51]

The issue of the economic impact of the FCC registration program was and is, in the words of former FCC Chairman Burch, "integral to a fair resolution" of the Docket No. 19528 proceeding.[52] In so stating, Chairman Burch was exhibiting both knowledge of the administrative process and an awareness of the views of this Court.[53] Surely, to say that the public interest is served by a decision whose sole basis is "it won't technically hurt" carries deference to administrative expertise far beyond the pale.

The majority opinion below acknowledges this fact. "We would be remiss, however, if we permitted the FCC to implement a registration program that would have major effects on rates paid by telephone subscribers without even considering that potential impact."[54] Unfortunately, the majority opinion, apparently sharing the Commission's concern for expedition, concluded that a requirement for anything beyond "a preliminary reasoned assessment"[55] of economic impact would frustrate the purpose of the Communications Act and be inconsistent with the Commission's power under

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[51] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); *Mobil Oil Co.* v. *FPC*, 417 U.S. 283 (1974).

[52] August 4, 1972 letter, quoted in Recommended Second Report and Order, — FCC 2d — (App. 10a).

[53] See *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959); *FPC* v. *Hunt*, 376 U.S. 515 (1964); see also *Carter Mountain Transmission Corp.* v. *FCC*, 321 F.2d 359 (D.C. Cir. 1963), *cert. den.* 375 U.S. 951 (1963).

[54] *Slip op.*, p. 46 (AT&T App. 33a).

[55] *Ibid.*

Section 205 of that Act (47 U.S.C. 205) to prescribe carrier practices and regulations.[56] In so concluding, the majority commits a double fault.

Its first fault, heavy reliance on its own theory of the Commission's Section 205 prescription power, has put its decision in direct conflict with the decision of the Second Circuit in *AT&T* v. *FCC,* 449 F.2d 439 (1971). Section 205 of the Communications Act (47 U.S.C. 205) does indeed confer on the FCC the authority to find existing carrier practices unlawful, and the power to prescribe what are and will be just, reasonable and lawful practices for the future. But as Circuit Judge Lumbard pointed out in reversing an FCC prescription of a carrier practice:

> "The Commission's authority to prescribe rates and practices is derived from § 205 of the Communications Act. That authority is not unlimited. To prescribe a practice the Commission must find that it is 'just, fair and reasonable,' and to prescribe a rate it must find that the rate is 'just and reasonable'. Valid findings of this kind are therefore essential to any exercise by the Commission of its authority under § 205(a)." (449 F.2d at 450).

In Judge Lumbard's case, the FCC found its prescribed practice "the best of the alternatives discussed herein." Noting the inadequacy of this finding and the Commission's continued refusal to make findings in terms of the statute, the court found that "Section 205(a) required the Commission to leave the matter of prescription for resolution on an adequate record after further proceedings" (449 F.2d at 451).

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[56] *Slip op.*, pp. 46-47 (AT&T App. 33a-34a).

In the case at bar, the Commission made no effort to justify its prescribed equipment registration program as just and reasonable, or even as the best alternative. As pointed out above, it refused to consider any issue but technical harm; and although the Commission more than somewhat cavalierly found existing carrier practices unlawful (56 FCC 2d at 598) (AT&T App. 10b-11b), the most it said for its prescribed program was that it wouldn't hurt. The Commission's oblivion to all other considerations extended, *mirabile dictu,* to knowledge of or concern for whether telephone equipment meeting its prescribed standards would even work! In the Commission's own words,

> "Customers who choose to use equipment not supplied by the telephone company assume the risk that this equipment will not perform adequately. Presumably, suppliers of inadequate equipment will not remain in the market for very long. The Rules in Part 68, however, assure that in failing to operate properly, even inadequate equipment will not harm the telephone network" (*Second Report and Order,* 58 FCC 2d at 742, n.8; AT&T App. 11c).

The reliance on and weight given by the majority below to Section 205 as authority for a prescription that may not work but won't hurt is clearly both erroneous and misplaced. As properly construed by the Second Circuit, application of Section 205 in this case would indeed have "required the Commission to leave the matter of prescription for resolution on an adequate record after further proceedings," *i.e.,* after consideration of economic consequences, adequate performance, and other public interest factors. The conflict here is clear and serious, and should be resolved by this Court.

The court below's second fault is that the "preliminary reasoned assessment" on which the majority relies is flatly contradicted by the Commission's own repeated assertion that the only issue before it was technical harm to the telephone network. Additionally, the "preliminary reasoned assessment" has twice more been contradicted by the Commission itself, first in its "First Report" in its Docket No. 20003,[57] where the Commission belatedly acknowledged that loss by telephone companies of terminal equipment can produce a net reduction in local operating company revenue, an adverse economic impact that "would probably be felt most severely by small independent telephone companies;" [58] second, in instituting another new proceeding (FCC Docket No. 20981, November 8, 1976), where the Commission announced that

> "We recognized that the separations process could work to the detriment of the independent telephone industry in the event any significant shift to customer-provided equipment should occur. . . ."

Given this recognition, the purposes of the new proceeding are stated by the Commission to be:

> ". . . whether and to what extent the use of customer-provided equipment will affect the revenues received by local companies through the separations/settlement process; what modifications, if any, should be made in existing separations procedures to ameliorate or avoid any adverse revenue consequences which might result through the

[57] *Customer Interconnection,* 61 FCC 2d 766 (1976). This report was a post-argument submission by the FCC to the court below, but the majority found no occasion to consider its accuracy or evidentiary support (Slip op., p. 12, n. 6).

[58] *Ibid.*

> continued application of existing separations procedures in an environment of customer-provided terminal equipment."[59]

Thus, the "preliminary reasoned assessment," if in fact contrary to the Commission's single issue pronouncements one was indeed made,[60] has been now twice discarded by the Commission itself.

B. Competition Cannot Be Equated with the Public Interest.

As decisions of this Court and of the United States Court of Appeals for the District of Columbia Circuit have firmly established, the introduction or stimulation of competition in the tightly regulated field of interstate commerce in communications cannot be assumed to be in the public interest.

As this Court emphasized in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), "Our difficulty arises from the fact that while the Commission recites the competition may have beneficial effects, it does so in an abstract, sterile way" (346 U.S. at 94). In the case below, the Commission recites that "competition has

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[59] *In the Matter of Impact of Customer Provision of Terminal Equipment on Jurisdictional Separations*, — FCC 2d — (FCC 76-1008, released November 8, 1976, ¶¶ 7-8).

[60] It appears that the majority below may have misconstrued the Commission's recitation that it had found no actual adverse economic impact from its interconnection policies to date (58 FCC 2d at 740) as a basis for similar expectations in the future. Obviously, past experience under an existing policy affords little if any basis for predicting or assuming similar results in the future under a new policy calling for "*a basic and substantial change* in the nature of" message telephone service (35 FCC 2d 539). See also *Western States Telephone Company* v. *AT&T*, 19 FCC 2d 1068, 1071 (1969) (telephone instrument supplier complaint would require new and different class of telephone service).

increased the utility of the nationwide telephone network, a result which we consider both privately and publicly beneficial" (58 FCC 2d at 740) (AT&T App. 9c).

The apparent basis for this abstract conclusion is the Commission's recitation that its interconnection policies have in the past resulted in expanded markets, price competition and innovation (*Ibid.*). Presumably, the theory underlying these recitations is that a collection of abstract, sterile recitations is better than one. For nowhere does the Commission make any effort to provide factual support for its assertion of past benefit, facts which certainly must be assumed to be available to the Commission if they exist; and nowhere does the Commission "warrant, as it were" (346 U.S. at 97) that its new policy, *i.e.*, the registration program, will serve some beneficial purpose in the future.

To warrant future benefits might indeed have been an impossible task for the Commission, for future benefits must be weighed in the balance with disadvantages; and as is clear, the Commission has steadfastly refused to consider the potential for adverse economic consequences before implementing its registration program.[61] That a public interest determination, which indeed may include competition as a factor, requires a balancing of benefits and detriments, seems almost too obvious to require citation. The Commission itself is aware of this requirement, as evidenced

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[61] The Commission's obvious difficulty in coming to grips with this critical issue may be the result of a dilemma of its own making. The Commission's contention that its program will have little or no economic impact is patently inconsistent with a conclusion that the program will result in significant public benefit.

by its *Carterfone* [62] statement that "We agree that economic effects upon the carriers' rate structure might well be a public interest question. But it is an issue . . . to be decided upon the facts, *i.e.*, will there be a 'cream skimming' effect, what will be the extent of it, and how does it weigh against the benefits of interconnection." (14 FCC 2d at 573). And as more recently noted by the First Circuit,

> "The FCC must determine whether a PRTC monopoly in this case will enhance the development of intrastate and interstate telephone service. Against that finding must be balanced the asserted countervailing interest of telephone subscribers 'reasonably to use . . . telephone[s] in ways which are privately beneficial without being publicly detrimental.' " [63]

That competition for the sake of competition without regard to possible adverse effects and economic con-

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[62] *Carterfone*, 14 FCC 2d 571 (1968). As Judge Widener, dissenting, correctly points out,

> "*Carterfone*, . . . never purported to examine the economic implications of that [*Carterfone*] policy . . . which had nothing to do with customer substitution of equipment traditionally supplied by telephone carriers."
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> "Had the FCC taken concrete steps to implement widespread customer substitution in *Carterfone*, as it has done here, the omission of an economic inquiry would have called into question the validity of its action at that time. That the Commission waited eight years before taking such steps does not relieve it of its basic obligation to consider fully all evidence bearing on the public interest in advance of taking regulatory action. The fulfillment of that obligation is what this case is about. A disinclination by the FCC, approved by the majority here, to 'revisit *Carterfone*' simply misses the point." (*Slip op.*, pp. 58-60; AT&T App. 40a-41a).

[63] *Puerto Rico Telephone Company* v. *FCC* (1 Cir. No. 76-1134, March 31, 1977, *Slip op.*, p. 12).

sequences is the objective of the FCC orders here involved becomes crystal clear in the Commission's insistence on the inclusion of carrier-provided equipment in its registration program. As observed by Circuit Judge Widener, dissenting:

> "The only possible rationale for registration of carrier equipment was well expressed by the Commission itself:
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> > 'Furthermore, when one participant in a competitive market is subject to regulatory constraints (e.g. registration of equipment) while another is not, there exists the possibility of using the registration, notification and complaint standards and procedures for competitive advantage.' FCC First Report and Order in Docket 19528, ¶ 20." [64]

Judge Widener's observation and his quotation from the Commission find apt characterization in Circuit Judge Wilkey's language in *Hawaiian Telephone Company* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974):

> ". . . it is all to embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among *competitors*.
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> This is *not* the objective or role assigned by law to the Federal Communications Commission." (498 F.2d at 776).[65]

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[64] *Slip op.*, p. 63 (AT&T App. 43a).

[65] Somewhat belatedly, FCC Chairman Wiley appears to have now concluded that additional steps involving a further assault on State regulation are needed to equalize competition. Noting that the telephone industry's ability to respond to competition is restricted by, *inter alia*, the need for regulatory approval of tariffs, the FCC Chairman has proposed deregulation of terminal equipment. (Address before International Communications Association, Toronto, Canada, May 16, 1977).

Clearly, both the FCC and the majority opinion below have misconceived the Commission's statutory role.

CONCLUSION

For the reasons assigned, a writ of certiorari to the Fourth Circuit Court of Appeals should issue, and this case should be set for review by the Court.

Respectfully submitted,

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May 27, 1977

APPENDIX

APPENDIX

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 19528

In the Matter of

Proposals for new or revised classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)

Recomended Second Report and Order

Adopted: February 25, 1976 Released: March 3, 1976

By the Federal-Joint Board: Chairman Wiley and Commissioner Lee issuing a dissenting statement in which the minority's recommendation is appended; Commissioner Hooks issuing a separate statement.

In a First Report and Order herein (First Report), adopted October 31, 1975, and released November 7, 1975, 56 F.C.C. 2d 593, the Commission established a registration program designed to allow users of the nationwide telephone network to connect terminal equipment other than private branch exchange (PBX) equipment, key telephone systems (KTS), and main station telephones, including coin telephones, to the network without the need for carrier-supplied connecting arrangements, provided they comply with the standards incorporated in the registration program to protect the network from harm. The standards and registration procedures are contained in a new Part 68 of the Commission's Rules.

In a Further Notice of Proposed Rulemaking herein, adopted October 31, 1975, and released November 7, 1975, 56 F.C.C. 2d 626, the Commission invited interested parties

to file comments on the proposed inclusion of PBX, KTS and main station telephones in the registration program established by the First Report. Comments were received from telephone companies [the Bell System Companies (hereinafter, AT&T), GTE Service Corporation and affiliated telephone companies (hereinafter, General), United System Service, Inc., and Continental Telephone Corporation] and their trade associations (National Telephone Cooperative Association; United States Independent Telephone Association); the United States Department of Justice; the Rural Electrification Administration (REA); the North Carolina Utilities Commission (NCUC); user groups (Association of American Railroads, Utilities Telecommunications Council, American Petroleum Institute, and Ad Hoc Telecommunications Committee); and equipment manufacturers and their trade associations (North American Telephone Association, Computer and Business Equipment Manufacturers Association, the Electronic Industries Association, International Telephone and Telegraph Corporation, Danray, Inc., Com-Path Division of Scott-Buttner Communications, Inc., and DASA Corporation).

The comments listed in the above paragraph fall into two general categories: *first*, there are comments which argue that it is inappropriate to include PBX, KTS and main station telephones within the scope of the FCC's registration program, and *second*, there are comments which argue that the Part 68 rules must be modified before including such equipment in the program.

Pursuant to Section 410 of the Communications Act, the Joint Board has carefully considered these comments on the proposed inclusion of PBX, KTS and main station telephones, as well as those sources listed in paragraph 16 of the First Report and Order, 56 F.C.C. 2d at 598 in reaching the recommended decision herein.

The Commission has stated in both its Notice of Inquiry, Proposed Rule Making and Creation of Federal-State Joint Board, 35 FCC 2d 539 (1972), and First Supplemental Notice, 40 FCC 2d 315 (1973), that a determination of whether the options available to customers in the interconnection of customer-provided facilities to the nationwide telephone network should be expanded is dependent upon the resolution of two basic isues:

> The first, or threshold question, is whether the telephone companies subject to our jurisdiction should be required or permitted to make further significant revisions in their MTS and WATS tariffs so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern if we should decide to extend such options to customers. [Par. 2, First Supplemental Notice, 40 FCC 2d 315 (1973)].

The resolution of what the Commission calls the threshold question is dependent upon a determination of whether the proposed expansion of the options for the interconnection of the various classes of terminal equipment would be in the public interest. Since we could not answer this question affirmatively in our Recommended First Report and Order, with regard to PBX, KTS, and main station and extension telephones, we concluded that those devices should not presently be included in the registration program.

The Comission indicated in the First Report and Order, at paragraph 18, that it believed that our decision to de-

fer the inclusion of these classes of devices in the program was based primarily on technical concerns. While we are concerned with whether technical harm to the telephone network would result from the inclusion of these devices in the registration program, this concern remains secondary until there has been resolution of what the Commission itself termed the threshold question. Even if we were convinced that no technical harm would result, we would have no rational basis for recommending the proposed inclusion of these classes of terminal equipment in the registration program when it has not been determined that the proposal is in the public interest.

Comments by some parties in support of the proposal imply that the issue of public interest was settled in favor of increased inter-connection options in *Carterfone,* 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1968). The Commission, however, pointed out in paragraph 8 of the 1972 Notice of Inquiry herein that the tariff requirements that the carrier be the sole supplier of the NCSUs and the CAs in these services do not violate *Carterfone.* It also explicitly stated that the present proceeding was to determine whether the expansion of interconnection options for the classes of devices under consideration is in the public interest:

> Our proceeding herein is concerned with *the pending and unresolved basic issues now before us as to whether, and to what extent, there is public need for us to go beyond what we ordered in Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others. (emphasis supplied) Par. 9, Notice of Inquiry, 35 FCC 2d 539 (1972).

In order to determine whether the proposed inclusion of PBX, KTS, and main station telephones in the registration program is in the public interest, we must consider whether the proposal would further the basic purpose of the Communications Act of 1934, as amended, which is ". . . to make available, so far as possible, to *all* people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." (Emphasis supplied.) 47 U.S.C., Sec. 151. Therefore, we cannot conclude that the proposal before us is in the public interest solely on the basis that the implementation of the proposal would not result in technical harm to the telephone network.

Nor can we find that the proposal is in the public interest because it would increase competition in the furnishing of these classes of terminal equipment. As Justice Frankfurter observed in *FCC* v. *RCA Communications Inc.*, 346 U.S. 86, 97 L. Ed. 1470, 73 S. Ct. 998 (1952):

> That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating, sense that we speak of competition as an ultimate good. . . .
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> The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications . . . . *FCC* v. *RCA Communications Inc.*, 346 U.S. at 91, 92, 93, 97 L. Ed. at 1476, 1477).

More recently, in *Hawaiian Telephone Company* v. *FCC*, 498 F. 2d 771 (1974), Judge Wilkey stated:

> The whole theory of licensing and regulation by government agencies in based on the belief that com-

> petition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy. Without in any way derogating the merits of the competitive free enterprise system in the economy as a whole, we cannot accept the action of the FCC here in a tightly regulated industry, supported by an opinion which does no more than automatically equate the public interest with additional competition. 498 F.2d at 777.

Although increased competition may not be equated with the public interest, it is a pertinent factor to consider inasmuch as it may or may not be of benefit to the public in furthering the goal of making rapid, efficient telephone service and adequate facilities available to all at reasonable charges. Benefits to a small segment of the public, such as possible lower costs to PBX users resulting from increased competition that may occur if the present proposal were adopted, do not demonstrate benefit to the national public interest. In fact, benefits to small segments of the public using interconnect equipment may have an adverse net economic effect on the vast majority of the using public.

Many of the comments filed in opposition to the proposed inclusion of PBX, KTS and main station telephones in the registration program have relied in part on economic studies that demonstrate the adverse economic impact which would result from liberalized interconnection of these devices. These economic studies have been filed in Docket No. 20003.[1]

One of the studies was issued by the Committee on Communications of the National Association of Regulatory

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[1] In the Matter of Economic Implications and Interrelationships arising from policies and practices relating to customer interconnection, jurisdictional separations and rate structures, Docket 20003. First Supplemental Notice, 50 FCC 2d 574 (1974); Notice of Inquiry, 46 FCC 2d 214 (1974).

Utility Commissioners (NARUC) on May 15, 1974, and is entitled: "An Investigation Into the Economic and Quality of Service Impact on Telephone Service Subscribers Resulting From the Interconnection of Subscriber-Provided Equipment to the Public Switched Telephone Network, and From Competition by the Specialized Common Carriers in the Provision of Telecommunication Services, Report after Investigation.". It was this report that we cited in our Recommended First Report and Order in support of our finding that it would be in the public interest to establish a registration program for customer-provided ancillary and data equipment, although doubt was expressed in the concurring opinion that the FCC possessed such authority under the Communication Act in its present form.

In this report, the NARUC Committee on Communications concluded that there will be a substantial adverse economic impact on local exchange telephone subscribers resulting from interconnection (principally of PBX and KTS). The NARUC Committee found that the competition of interconnection would result in minimum revenue losses to the telephone companies of approximately $360 million to $740 million annually by 1980, and $900 million to $1.0 billion annually by 1984. The Committee further concluded that residential subscribers would be forced to bear the cost of the interconnection by paying increased residential exchange rates to make up for the revenue lost to competition by the telephone companies. This is because residential subscribrs are the only class of telephone users that would not be able to react to increased rates by turning to a competitor of the telephone companies for service.

A study prepared by the Communications Division of the New York Public Service Commission entitled "The Revenue and Cost Impact of Interconnection Within the Service Area of New York Telephone Company," published in January 1975, has also been filed in Docket No. 20003. Its conclusions, with regard to the economic impact of inter-

connection in the New York Telephone Company service area, are similar to the NARUC Committee's findings concerning the impact on the entire telephone network. The study projects that by 1984 the annual loss of revenue resulting from interconnection of PBX and KTS, adjusted to 1974 cost and market levels, will be from $57 million to $71 million.

These studies indicate that an expansion of the options under which customers can provide their own equipment to replace parts of the telephone system may impede the national goal of making available "to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...." While business users, given a choice in satisfying their communications needs, could shop for the lowest prices and thereby achieve rate reductions, and while equipment manufacturers would achieve increased profits, the residential telephone user would be forced to pay higher rates to make up the revenue lost by the telephone company. The continually increasing costs for the home telephone user will likely result in a concomitant increase in the number of the less affluent throughout the country who will not be able to afford the basic local telephone service. We could hardly conclude that such a result, which contravenes the purpose of the Communications Act, would be in the public interest.

It has long been recognized that the economic impact is an important factor to be considered in determining whether a proposal for expanded options for interconnection is in the public interest. The Commission stated in its denial of reconsideration of the *Carterfone* decision:

> We agreed that economic effects upon the carriers' rate structure might well be a public interest question. But it is an issue, if a carrier seeks to raise it, to be decided upon the facts, i.e., will there be a "cream skimming" effect, what will be the extent of it, and

> how does it weigh against the benefits of interconnection. As is the case with the question of technical harm, a tariff is unreasonable if it assumes *a priori* a conclusion as to such an issue. [footnotes omitted]. (14 FCC 2d 571, 572-573.)

The Commission has previously indicated that the economic impact would be considered before a final decision is made on any proposal for expanded interconnection. In the 1973 First Supplemental Notice herein, it emphasized its concern "at this stage of the proceeding with whether it is feasible from a technical, engineering, operational, and administrative standpoint" to establish a program of technical standards for customer provided facilities. 40 FCC 2d at 318. The Commission added:

> . . . we are not considering at this time questions as to whether or to what extent there may be any adverse economic or environmental consequences from the ultimate adoption of any of these proposals. We shall cover such issues in an appropriate manner by further supplemental notices in the near future. (Ibid.)

Although the Commission has clearly expressed its intention to consider economic impact before the "ultimate adoption" of any proposal, the economic impact of the proposal before us has not yet been considered.

On August 4, 1972, then FCC Chairman Dean Burch, in responding to a letter of July 13, 1972, from Chairman Ben Wiggins of the NARUC Committee on Communications, stated that:

> Your letter proposes several specific actions that you urge this Commission to take. First, you request that the Federal-State Joint Board convened last month in Docket 19528 should, as part of that proceeding, "conduct an in-depth study of what the economic impact of liberalized interconnection would be on non-

> interconect users (of telephone company services)." I quite agree with you that this question is integral to a fair resolution of the proceeding and, indeed, our staff is already engaged in a series of such studies—as a basis for framing the specific economic issues to be considered as well as the methodology required for their effective treatment. We will always be open to detailed recommendations concerning this aspect of the proceeding and urge that you and your staff specialists bring relevant proposals to our attention at the earliest possible moment. If our two organizations can encourage joint or complementary studies, that too would be an activity in which we would be eager to take part. *84th NARUC Annual Convention Proceedings,* p. 1181 (1972).

Although economic impact issues were to have been originally considered in this proceeding, the Commission in April 1974 instituted Docket No. 20003 to investigate several aspects of economic impact, including that of interconnection. The Commission, in its Notice of Inquiry in Docket No. 20003, 46 FCC 2d 214 (1974), indicated the need to determine the economic impact of expanded interconnection by stating that:

> ...we expect that the record developed in this inquiry will be used in part to facilitate the resolution of questions of fact, law or policy involved in certain other rule-making proceedings now pending before us hereinafter identified. (Notice of Inquiry, par. 3.)
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>
> Accordingly, one of the fundamental purposes of this inquiry is to explore fully the effects on the costs and availability of basic local telephone exchange service of (a) the regulatory actions we have taken to date on customer interconnection as reflected in the currently effective tariff provisions offering interconnected in-

> terstate message toll and wide area telephone services to customers subject to certain protective provisions initiatd and devised by the telephnoe companies to insure against technical harm to the network; and (b) the regulatory actions we are urged to take by many parties in Docket 19528 to remove the present condition that interconnection may only be made through carrier-provided network control signalling units and connecting arrangements. (Notice of Inquiry, par. 9, 46 FCC 2d at 217.)

Moreover, President Gerald R. Ford on July 10, 1975, in his remarks to the Chairman and Commissioners of the Independent Regulatory Agencies said:

> First, there must be a constant effort to improve each commission's ability to identify the costs and the benefits of current and proposed regulation. You should make sure that the quality of your economic analysis matches your high standards of elgal professionalism.
>
> In particular, the costs, as well as the benefits, of restricting competition, must be considered. Also, the benefits of worthwhile social goals must be weighed against their economic cost to the Nation as a whole.
>
> As you know, I have ordered all departments and agencies to prepare an inflation impact statement on each of their major proposals.[2] I am pleased that the House of Representatives has changed its rules to require similar analysis—and I note that the Senate in several similar measures is doing to same thing. I ask

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[2] Executive Order 11821 [39 Fed. Reg., p. 41501 (Nov. 29, 1974) requires all Executive Agencies to issue inflation impact statements with any new rules, regulations, and proposed rules. The implementation criteria are stated in OMB Circular A-107. The certification language and form are stated in 40 Fed. Reg., p. 26312 (June 23, 1975)].

each of you to give this matter the highest priority. NARUC Bulletin No. 29-1975, p. 19.

Obviously, the Commission cannot engage in rational decision making with respect to the present proposal to expand the interconnection registration program without *first* seeking to ascertain its probable impact on the vast majority of the American people.[3] The most important rate in the communications industry today, both politically and socially, is the price a residential telephone user must pay to have a telephone installed and maintained in his home.

We agree with the Commission's statement in paragraph 19 of its First Report in this proceeding wherein it said, ". . . the Docket No. 20003 inquiry is not to become a 'dumping ground' for existing docketed proceedings." We would add to this caveat, however, that Docket No. 20003 must not become a "dumping ground" for the basic economic issues that should and must be considered in order to make a rational decision in this proceeding.

In our First Recommended Report and Order we were able to find that no substantial questions of adverse eco-

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[3] Compare *Duquesne Light Company* v. *EPA*, 522 F.2d 1186(8), 1196 (1975), where the court held that when evidence indicated that cost of scrubbers which utilities were directed by EPA Administrator to install at their generating plants would require increase in price of electricity of between 25 and 35%, that such an increase in price could be expected to increase unemployment in the area served by the utilities, and that it would be difficult for the Administrator's approval of State implementation plan without investigating and resolving the economic questions was arbitrary, capricious and an abuse of discretion. See also: *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 153, 91 S. Ct. 814 (1971); *SEC* v. *Chenery Corp.*, 332 U.S. 197, 207, 67 S. Ct. 1575, 1580, 91 L. Ed. 1995, 2005 (1947), rehearing denied 332 U.S. 747, 68 S .Ct. 26, 92 L. Ed. 367; *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971); *Grace Lines, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959); and *Missouri Roofing Company, Inc.* v. *Udall*, 277 F. Supp. 464 (W.D. Okla. 1967).

nomic impact on the public interest exist with regard to the interconnection of ancillary and data equipment.[4] Therefore, we could recommend that the implementation of a registration program for those classes of devices could proceed without awaiting findings in Docket No. 20003 provided the FCC has the requisite authority under the Communications Act.[5] On the other hand, we find that substantial questions do exist as to whether the economic impact resulting from the inclusion of PBX, KTS and main station telephones in the registration program would be of such a magnitude as to render this proposed action adverse to the public interest at this time.

For the foregoing reason, we recommend that further consideration of the proposal to include PBX, KTS and main station telephone in the registration program adopted in the First Report herein should be deferred until the conclusion of the related economic impact study in Docket No.

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[4] In paragraphs 11 and 12 of the Recommended First Report and Order, 53 FCC 2d 221, 223-24, the Joint Board cited the economic impact study of the NARUC Committee on Communications filed in Docket No. 20003 on May 16, 1974. The NARUC study concluded that "ancillary equipment" (not including extension telephones) could be provided by customers under a certification program. The reason for excluding PBXs and key systems was stated by the NARUC to be that those services "have traditionally been provided by the telephone companies as an integral part of their service offering. The arguments in favor of interconnection generally do not apply to this class of equipment, and permitting interconnection will have significant adverse effects."

[5] This issue is now before the United States Court of Appeals for the Fourth Circuit in *North Carolina Utilities Commission* v. *FCC*, Case Nos. 74-1220, 74-1390, 74-1449, 74-1514, 74-1515 and 74-1516, which involve an appeal of the FCC's order in *Telerent*, Docket No. 19808 [45 FCC 2d 204 (1974)]. The question of lack of FCC jurisdiction to implement the registration program was referred to in the concurring opinion of the State members of the Joint Board in the Recommended First Report and Order. NARUC Bulletin No. 18-1975, pp. 24-25.

20003. We urge that this Docket be concluded with all deliberate speed.

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• See attached Dissenting Statement of Chairman Richard E. Wiley and Commissioner Robert E. Lee to which the Minority's Recommendation is Appended.

• See attached Separate Statement of Commissioner Benjamin L. Hooks.

Dissenting Statement of Chairman Richard E. Wiley and Commissioner Robert E. Lee to which the Minority's Recommendation is Appended

For reasons which are beyond the scope of this proceeding, the Joint Board majority has today recommended that main telephones, key telephone systems, and PBX equipment not be included in the registration program adopted by the Commission in its First Report and Order in this proceeding. This recommendation is based solely on the majority's general fears concerning possible revenue losses the telephone companies may suffer as a result of competition in the terminal equipment field—not on any asserted danger of technical harm to the network.

The majority's reasoning reflects a fundamental misconception of the purposes underlying Docket 19528. This proceeding has never been intended as a forum for addressing the issue of whether the carriers' alleged loss of revenues due to terminal competition outweigh the public interest benefits of increased communications options and flexibility for users of the switched telephone network—nor have such matters been fully developed and investigated herin.

Indeed, competition in the terminal market has existed since 1969 when telephone company tariffs filed in response to *Carterfone* permitted interconnection of customer-supplied equipment through telephone company connecting arrangements. These connecting arrangements (for which a monthly charge is assessed) were never alleged to be necessary as an anticompetitive deterrent to the purchase of non-carrier equipment. Nor were they alleged to be necessary as a surcharge needed to produce revenue "contribution" to the telephone companies. Rather they were alleged to be necessary solely to protect the nation's telephone network from any technical harms which non-carrier terminals might produce. Accordingly, the scope of this proceeding has been exclusively concerned with technically

acceptable alternatives to the existing connecting arrangements.

The FCC has provided that carriers could raise economic isues arising from its *Carterfone* decision on a case-by-case basis where specific facts are presented. To date, no carrier has taken advantage of this opportunity. In Docket 20003, the Commission has also afforded parties the opportunity to present facts, studies, or opinions regarding both present and future economic effects resulting from, among other things, liberalized interconnection and competition in various sectors of the communications industry. Based on the information gained from this inquiry, we fully expect to institute further rule-making or other proceedings as appropriate, dealing in a comprehensive and coordinated manner with both the carriers' alleged losses and the public benefits of competition.

The elaboration of its economic concerns is the theme of the majority recommendation, and since such considerations are not within the scope of this proceeding we will not comment in detail thereon. However, we should like to correct an apparent misconception which appears to underlie the statement on page 5 of the majority's recommendation that "Nor can we find that the proposal is in the public interest because it would increase competition in the furnishing of these classes of terminal equipment." The Commission has never, in its *Carterfone* decisions or subsequent actions related thereto, relied on an increase in competition as a primary basis for its determinations. The guiding principle in Carterfone and related decision has been to afford the users of the nationwide telecommunications network greater flexibility and choice in their user of that network—through customer-provided terminal equipment—in ways which are privately beneficial without being publicly detrimental. By affording telephone customers more freedom of choice in the provision and interconnection of terminal equipment, the markets for such devices

have expanded, and price competition and innovation on the part of both the telephone companies and independent equipment suppliers *has* resulted. This competition has increased the utility of the nationwide telephone network, a result which we consider both privately and publicly beneficial—but competition *per se* has not been the Commission's objective.

In view of the serious deficiencies which we find in both the legal basis for and the substance of the majority's recommendation, we must dissent therefrom. We believe the attached draft recommendation prepared by the FCC's Common Carrier Bureau reflects the proper disposition of the issues which fall within the scope of this proceeding, and recommend its adoption in lieu of that submitted by the Joint Board majority.

DRAFT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 19528

In the Matter of

Proposals for new or revised classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)

Recommended Second Report and Order

Adopted: Released:

By the Federal-State Joint Board:

1. In a First Report and Order herein (First Report), released November 7, 1975, 56 F.C.C. 2d 593, the Commission established a registration program designed to allow users of the nationwide telephone network to connect terminal equipment other than PBX's, key telephone systems, main station telephones, and coin telephones to the network without the need for carrier-supplied connecting arrangements, provided they comply with the standards incorporated in the registration program to protect the network from harm. The standards and registration procedures are contained in a new Part 68 of the Commission's Rules.

2. While the Commission was tentatively of the view that main telephones, private branch exchange (PBX) equipment, and key telephone (KT) equipment presented no valid distinction as to potential for "harm", compared with equipment already within the scope of Part 68 (*see* First Report, paragraph 18), it offered parties to this proceeding an additional opportunity for further comment on

their inclusion.[1] Comments were received from telephone companies (the Bell System Companies (hereinafter, AT&T), GTE Service Corporation and affiliated telephone companies (hereinafter, General), United Systems Service, Inc., and Continental Telephone Corporation) and their trade associations (National Telephone Cooperative Association; United States Independent Telephone Association); the United States Department of Justice; the Rural Electrification Administration (REA); the North Carolina Utilities Commission (NCUC); user groups (Association of American Railroads, Utilities Telecommunications Council, American Petroleum Institute, and Ad Hoc Telecommunications Committee); and equipment manufacturers and their trade associations (North American Telephone Association, Computer and Business Equipment Manufacturers Association, the Electronic Industries Association, International Telephone and Telegraph Corporation, Danray, Inc., Com-Path Division of Scott-Buttner Communications, Inc., and DASA Corporation).

3. The comments listed in paragraph 2 above, fall into two general categories: *first,* there are comments which argue that it is inappropriate to include main station telephones, PBX's and key telephone systems within the scope of the FCC's registration program, and *second,* there are comments which argue that the Part 68 rules must be modified before including such equipment in the program.

4. Pursuant to Section 410 of the Communications Act, the Joint Board has carefully considered these comments on the planned inclusion of main telephones, PBX and KT equipment, as well as those sources listed in paragraph 16 of the First Report and Order, 56 F.C.C. 2d at 598 in reaching the recommended decision herein.

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[1] *See* 56 F.C.C. 2d 626 (1975).

DELINEATION OF THE ISSUES

5. The matter now before the Joint Board is a direct outgrowth of, and falls within the overall policy framework established by, the Federal Communications Commission's *Hush-A-Phone* and *Carterfone* decisions.[2] In *Hush-A-Phone* the Commission ruled, pursuant to judicial guidelines, that:

> In addition to invalidating the defendants foreign attachment tariff regulations insofar as they bar the use of the Hush-A-Phone device, an inescapable consequence of the Court's opinion is to render such tariff regulations unjust and unreasonable *insofar as they may be construed or applied to bar a customer from using other devices which serve the customer's convenience in his use of the facilities furnished by the defendants and which do not injure the telephone companies' employees or facilities, or the public in the use of defendants' services, or impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition against the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants.* Such a regulation goes beyond what is reasonably required in the interest of protecting the defendants' employees, facilities, the telephone system and the public from adverse effects. (emphasis supplied) 22 FCC 112, 113-114 (1957).

6. In *Carterfone*, the F.C.C. applied the same basic principles in ruling that a device used to interconnect mobile

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[2] *Hush-A-Phone Corp.* v. *U.S.*, 99 U.S. App. D.C. 190, 238 F. 2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1968); *see also, Interstate and Foreign Message Toll Telephone, etc.*, 56 F.C.C. 2d 593, 594-96 (1975).

radio systems to the interstate and foreign message telecommunications system filled a need, that its use did not adversely affect the telephone system, and that the AT&T tariff prohibiting its use was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act of 1934. The F.C.C. also made it clear that the *Carterfone* decision was not limited to the Carterfone device *per se*, but was rather a broad general policy.[3]

7. Pursuant to the *Carterfone* decision, AT&T filed tariffs (in which its connecting carriers concurred) which generally allowed the interconnection of all types of customer-provided terminal equipment, provided that direct electrical connection would be accomplished only through carrier-supplied "connecting arrangements," (interface devices designed to protect the network from technical harm). Without ruling as to the necessity for or lawfulness of the tariff requirement that carrier-supplied connecting arrangements be employed, the Commission allowed the Carterfone tariffs to go into effect. Thus, since 1968, customers have been afforded the right pursuant to *Hush-A-Phone* and *Carterfone* to provide their own terminal equipment of all types, and independent manufacturers and distributors have been afforded the opportunity to supply such equipment to the public in competition with the vertically integrated telephone industry.

8. In recognition of the fact that the post-Carterfone tariff conditions continue to impose certain restrictions on both the customer and the independent supplier of terminal equipment, the Commission at the same time instituted informal proceedings to obtain technical and operational data to assist its evaluation of the public interest factors involved in the possible liberalization of the network control signalling unit and connecting arrangement provisions of the revised tariffs. Further, on June 14, 1972, the Com-

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[3] The parties recognized this and themselves argued on a broad policy basis. *See, Carterfone*, 13 F.C.C. 2d at 425 (1968).

mission instituted this proceeding by Notice of Inquiry and Proposed Rule Making, 35 FCC 2d 539 (1972), to determine whether and under what terms, conditions, or limitations the interstate MTS and WATS tariffs should be revised to allow customers to have the option of furnishing any needed network control signalling units and connecting arrangements (or the functional equivalent thereof), and to determine what rules, if any, the Commission should adopt with respect to the foregoing.

9. On November 7, 1975, after lengthy proceedings in this Docket, the Commission issued its First Report and Order, in which it concluded that:

(1) The present tariff provisions requiring the use of carrier-supplied connecting arrangements impose an unnecessarily restrictive limitation on the customer's right to make reasonable use of the service and facilities furnished by the carriers.

(2) They constitute an unjust and unreasonable discrimination both among users (or classes of users) and among suppliers of terminal equipment.

(3) The standards and procedures prescribed for the registration with the FCC of protective circuitry and/or terminal equipment will provide the necessary minimal protection against network harm, which has been specified in various carrier operating procedures and/or the recommendations of the Joint Board and others, and will serve the public interest.

10. While the proceedings in this Docket were continuing, the F.C.C. initiated a broad fact-finding inquiry into the economic implications and interrelationships among a number of industry developments, policies, and practices—some instituted pursuant to regulatory policy, others car-

rier-initiated.[4] In its Notice of Inquiry in Docket No. 20003, the F.C.C. stated it would look into the effect of current pricing practices and regulatory policies on the level and distribution of customer charges for various telecommunication services, and in particular on the extent to which various categories of customers are now or will be, under alternative pricing practices and regulatory policies, subsidizing the services received by others. Of particular concern in that proceeding are the comparative economic effects on both overall telecommunications costs and charges and on the costs and charges for different categories of both public and business customers, of such factors as the interconnection and use of customer-provided facilities, the use of specialized common carrier services in lieu of common carrier private line services, the use of flat-rate and other cost-insensitive pricing practices for local exchange services, and the jurisdictional separation of revenues and expenses for plant and facilities commonly used for both intrastate and interstate (including foreign) services.

11. The issue now before the Joint Board in Docket 19528 has thus been clearly delineated as a consequence of prior Commission decisions extending back to *Hush-A-Phone*. The issue is not whether customers should be afforded the opportunity to interconnect their terminal equipment with the telephone network via direct electrical connections. That issue was decided by the Commission and the Courts in *Hush-A-Phone* and *Carterfone;* to the extent that parties may believe it necessary or desirable to revisit those decisions, that is a matter beyond the scope of this proceeding. Nor is the issue one of potential economic impact on the carriers. That issue was also addressed initially and disposed of in the *Carterfone* decision. To the extent that any specific cases of economic harm can be demonstrated, to such an extent as to affect

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[4] *Economic Implications Relating to Customer Interconnection, Jurisdictional Separations, and Rate Structures*, Docket No. 20003, 46 F.C.C. 2d 214 (1974).

the carriers' ability to continue providing essential public telecommunications services, parties have been and continue to be afforded the opportunity pursuant to *Carterfone* to make such a showing and to seek appropriate relief. To the extent that more general allegations and issues of potential future economic harm are concerned, such matters are being addressed in the Commission's concurrent and broad-ranging economic inquiry, Docket 20003. Thus, the single issue now before the Joint Board is whether, having adopted a terminal equipment registration program for the reasons cited in its November 7, 1975 Order, it is reasonable for any valid technical or legal bases, for the FCC to continue excluding PBX's, key telephone systems, and main station telephones from this registration program.

DISCUSSION

12. Certain parties (primarily the telephone companies) argue that main telephones, PBX and KT equipment should remain excluded from the scope of the FCC registration program pending the outcome of the Commission's economic inquiry in Docket No. 20003. As was indicated in the First Report (*see* paragraphs 18 and 19, and footnote 10 thereto) such general comments addressing the basic *Carterfone* policy are not relevant to this phase of the Docket No. 19528 proceedings. From its inception, Docket No. 19528 has been concerned solely with the issue of technical harm. Pursuant to *Carterfone,* parties have been and continue to be afforded the opportunity to demonstrate specific instances of economic harm as a basis for seeking relief from the full application of this policy. To date, only one party has sought a hearing on this basis, and that hearing was terminated prior to the introduction of evidence, at the petitioner's request.[5] Docket No. 20003, on the other hand, has been from its inception concerned with a broad range of interrelated economic issues of general applica-

[5] *Mebane Home Telephone Co.*, FCC 75M-1788 (released October 17, 1975).

bility (see paragraph 10, above). Parties are being afforded ample opportunity in Docket No. 20003 to address all these interrelated issues in a factual manner, and we would expect the Commission to initiate appropriate rulemaking or other actions as warranted by the findings in that proceeding. However, the Commission has made it abundantly clear from the first Notice of Inquiry in Docket No. 20003 that initiation of this proceeding would not necessarily preclude further action in Docket No. 19528. We do not intend, as some parties would have us do, to prejudge the outcome of the Docket No. 20003 inquiry in favor of *any* party. For the purpose of proceeding with Docket No. 19528 it is sufficient to note the absence to date of any showing before the FCC that any actual economic harm has been experienced much less that this has adversely affected any carrier's ability to serve the public. Comments received herein broadly allege some adverse economic impact without quantification.[6] Such allegations are not a demonstration of expected economic impact sufficient to require that the rights of connecting registered equipment under Part 68 to the telephone network be denied to all telephone subscribers, nationwide. In this regard, it is important to remember that competition in the supply of *all* types of terminal equipment has existed since *Carterfone*. The FCC's registration program does not extend the area of competition; it merely removes what has been found to be an unnecessary and discriminatory carrier-imposed restriction on the manner in which customer-provided equipment may be connected to the network.

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[6] GTE cites its allegations in Docket No. 20003 as some indication of the present contribution of PBX and KT equipment to its revenues, without quantifying how much of such contribution is expected to be lost as a result of applying Part 68 to such equipment. GTE merely assumes, without explanation, that 50% of the replacement and growth market would be penetrated by competition. Such assumptions and allegations are being thoroughly scrutinized in Docket 20003; but they can hardly be considered sufficient to justify further delay in this long-pending proceeding.

13. Some parties (again, primarily the telephone companies) take the position that Part 68 should not be extended to encompass main telephones, PBX and KT equipment as such equipment has a high incidence on the telephone network, and that the present inadequacies of Part 68 would become more acute. This argument is incorrect. First, the FCC registration program has been drawn to achieve the same result as the telephone companies' own protective devices have achieved since January, 1969. Second, if equipment is actually harmful, the telephone companies have the right to disconnect it from the network by discontinuing service (Section 68.108 of the Rules), and thus actually harmful equipment will not remain connected to the telephone network. Third, to the extent that the technical requirements of Part 68 are inadequate (and in our view this is not the case), interested parties can petition for changes in the Part 68 rules at any time. Alternatively stated, the proper remedy for an allegedly inadequate technical requirement is not to deny the rights of connecting registered equipment under Part 68 to all telephone subscribers indefinitely. Rules often change as requirements change; the purpose of allowing petitions for rulemaking is to accommodate such changed requirements. With regard to the Part 68 technical requirements, it should be noted that many of the changes which AT&T has suggested in an amendment to its Petition for Reconsideration, filed January 22, 1976, recommend *less* stringent parameters than are presently contained in Part 68.

14. Another argument is that (in GTE's view) main telephones should not be included as it is important that there be at least one telephone company-provided instrument on the customer's premise to assure compatibility with the telephone network and fulfill the telephone company's "end-to-end" service responsibility. However, the telephone companies have provided connecting arrangements without an associated telephone instrument, and therefore must have themselves concluded that there is no

such necessity.[7] Second, in the First Report and Order, compatibility was distinguished from network harm (e.g., *see* paragraph 22, and Section 68.110(a) of the Rules). Third, the telephone companies do not even now have "end-to-end" responsibility where customer-provided equipment is used. They are only responsible for the service which they provide. When a customer chooses to use equipment not provided by the telephone company, the telephone company is only responsible for providing adequate communication line service. Obviously, the telephone company cannot be responsible for the performance of equipment which it does not provide, install and maintain.[8]

15. The telephone companies, and their trade associations, also oppose inclusion of telephone company-provided main station telephones, PBX and KT equipment for the same reasons as were stated in Petitions for Reconsideration of the First Report and Order. Both the Joint Board, in its Recommended First Report and Order, and the Commission, in its First Report and Order and its Memorandum Opinion and Order on reconsideration thereof, have ruled that telephone company equipment should be included in the scope of Part 68. No new arguments have been advanced in support of changing present provisions of Part 68 with regard to telephone company-provided

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[7] F.C.C. Tariffs No. 259 (WATS) and 263 (MTS) impose no requirement for a carrier-supplied telephone instrument in addition to a connecting arrangement for connection of customer-provided terminal equipment and/or systems. Also, the alleged requirement is plainly impractical in the case of PBX trunks (presently used with connecting arrangements) which are not even compatible with a telephone instrument.

[8] Customers who choose to use equipment not supplied by the telephone company assume the risk that this equipment will not peform adequately. Presumably, suppliers of inadequate equipment will not remain in the market for very long. The Rules in Part 68, however, assure that in failing to operate properly, even inadequate equipment will not harm the telephone network.

equipment, as applied to main telephones, PBX and KT equipment.

16. Many parties have filed comments addressing the applicability of the technical requirements of the Commission's present registration program to main telephones, PBX and KT equipment. Such parties have pointed out that the specific technical requirements of Subpart D of Part 68 will have to be varied to accommodate certain differences between telephone lines and telephone trunks (trunks are used with PBX equipment). In addition, the comments argue that specific parametric values which are presently contained in Subpart D should be changed to accommodate this equipment. Inasmuch as the technical requirements of Part 68 will in all probability be changed shortly, in response to AT&T's January 22, 1976 filing of comprehensive technical revisions to the rules adopted in the First Report and Order, and in response to comments solicited thereton, we shall not recommend specific parametric values of each parameter presently contained in Subpart D as applied to main telephones, PBX and KT equipment. Rather, we shall qualitatively address those technical arguments which recommend changes to Subpart D to accommodate any requirements of main stations, PBX and KT equipment which differ from equipment presently within the scope of Part 68. The Commission's upcoming Order which deals with the specific parametric changes which are expected to evolve from AT&T's January 22, 1976 filing will be applicable to this equipment as well.

17. The general technical standards of Part 68, as contained in Subpart D thereof, are applicable to main telephones, PBX and KT equipment. Each of hazardous voltages, longitudinal balance, signal power, and leakage currents must remain within stipulated limits to prevent harm. Additionally, "pre-trip" and "false trip" must be prevented, and proper operation of billing equipment must

be assured. All of the above must occur within foreseeable environmental and electrical stresses to which equipment will be subjected during shipment, installation and use. Improper network control signaling, except as it affects proper billing and "pre-trip" and "false trip" does not have to be specifically protected against by equipment registration. The Commission's reasons for excluding network control signaling from the registration program's requirements, as expressed in paragraph 22 of the First Report and Order are equally applicable to main telephones, PBX and KT equipment. And in the case of PBX and KT equipment, which is predominantly used for business applications, the decrease in utility of the telephone service to the user as caused by faulty network control signaling would strongly motivate a business user to have such equipment repaired. An inability of a business telephone user to receive telephone calls, generate telephone calls, or reach desired telephone numbers goes beyond mere inconvenience; such inability would adversely affect his business.

18. Since all types of telephone equipment presently included within the scope of Part 68 are connected to telephone lines (or as ancillaries to other terminal equipment), and main telephones and KT equipment are also connected to telephone lines (as opposed to trunks), the technical standards contained in Part 68 are equally applicable to these types of equipment. Furthermore, as AT&T pointed out, there is no difference between a main telephone (presently excluded) and an extension telephone (presently included).[9]

19. PBX equipment which is currently connected to the telephone network uses "loop start" and "ground start" trunks for connection with Message Telecommunications

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[9] To the extent that the present Subpart D technical requirements are ultimately changed to reflect the concerns which were manifested in AT&T's January 22, 1976 filing, such changes will also accommodate the connection of main telephones and KT equipment.

Service (MTS) and Wide Area Telephone Service (WATS). A "loop start" trunk is essentially a line; its network control signaling is identical in form to that employed on lines, and thus the limits contained in Subpart D are applicable to "loop start" trunks without modification to accommodate differing signaling. A "ground start" trunk uses the intentional connection with earth ground of one trunk wire at the central office to indicate the start and end of a call, and the indirect connection of one trunk wire with earth ground at the PBX to sense this central office-end connection with earth ground through PBX circuitry, as well as the direct connection of one trunk wire with earth ground at the PBX to indicate the start of an outgoing call (this connection is removed when the central office returns a signal indicating its readiness to proceed with the call). Thus, it is only in the case of equipment which is connected to "ground start" trunks that the Subpart D technical requirements need to be modified to accommodate circuitry and protocols associated with connections with earth ground.

20. *Leakage Current Limitations.* The limitations in Section 68.304 are inapplicable to PBX equipment intended for use with ground start trunks in their present form. As applied to such equipment, the leakage current limitations should apply between the telephone connections and all possible combinations of exposed conductive surfaces on the exterior of such equipment or circuitry, and between the power connections and all possible combinations of exposed conductive surfaces on the exterior of such equipment or circuitry, but *not* between the telephone connections and the power connections.

21. *Longitudinal Balance Limitations.* The limitation in Section 68.310 is inapplicable to PBX equipment intended for use with ground start trunks in its present form. As applied to such equipment, this limitation is applicable when a connection has been established and there is a

transmission path established capable of passing signal energy in the voice band.

22. *On Hook Impedance Limitations.* The limitations in Section 68.312 are inapplicable to PBX equipment intended for use with ground start trunks in their present form. As applied to such equipment, these requirements are varied as follows:

a. During the quiescent state, when the trunk is not being used for communications although it is available for such use (broadly, the on-hook state) registered terminal equipment and registered protective circuitry shall assure that the d.c. resistance between the trunk connections, and between each trunk connection and earth ground, under all reasonable applications of earth ground to the registered terminal equipment or registered protective circuitry or equipment connected thereto, shall be greater than or equal to 20,000 ohms, if measured with a current-limited 48 volt d.c. voltage source (both polarities) to each specified pair of points.

b. If a 2-second on/3-second off simulated ringing signal consisting of the sum of 75 volts d.c. and 100 volts, a.c., rms. in the frequency range of 16-2/3 through 66-2/3 Hertz, is applied to the trunk connections, no more than 3 ma. d.c. shall flow during the on and off time intervals in the mesh formed by the ringing signal simulator and the two trunk connections.

c. A Ringer Equivalence Number (essentially, the quiescent unit admittance of the trunk connections) shall be determined in accordance with Section 68.312.

d. The requirements of this section are inapplicable to direct-in-dialing (DID) trunks.

23. *Hazardous Voltage Limitations.* In its comments, AT&T indicates that the hazardous voltage limitations

in Section 68.306 do not accommodate the normal introduction of non-continuous ringing signals into the telephone network by PBX and KT equipment. Accordingly, Section 68.306 should be modified to provide for a new sub-section (c) as follows:

> (c) The requirements of the previous two sections applied to registered protective circuitry and registered terminal equipment intended for use with PBX and KT equipment, shall not apply during the intended application of ringing signals of no longer than 5 seconds duration to the telephone line or trunk connections.

24. *Standard Plugs and Jacks.* AT&T also indicates its belief that plugs and jacks may not be appropriate for connection of PBX and KT equipment to the telephone network. Accordingly, at such time as the Commission adopts a final decision as to the inclusion of PBX and KT equipment in Part 68, we recommend that it institute cooperative meetings, similar in format to the plug/jack meetings contemplated in paragraph 49 of the First Report, to arrive at a suitable means of connection of PBX and KT equipment to the network.

25. *Signal Power Limitations.* AT&T argues that the Part 68 signal power limitations are not applicable to PBX and KT equipment as, if applied, these limitations would require signal power limiting for the station equipment associated with such systems, and such limiting is inappropriate and unnecessary if adequate controls are maintained with respect to such station equipment. Presumably the controls which AT&T is referring to are the use of telephone sets equipped with accousto-electrical transducers (essentially, microphones) which, when supplied with a given amount of d.c. line power, inherently limit the signal power applied to the telephone network. Key telephone systems connect the telephone line directly to the telephone sets, thus registration of key telephone

instruments as conforming to the requirements of Section 68.308(a) would assure limiting without requiring the specific inclusion of limiting components in such sets. Telephone sets used with PBX equipment, if registered as conforming with Section 68.308(a) would similarly provide such assurance, so long as the PBX common equipment does not supply such sets with d.c. line power in excess of that which would be supplied by a telephone line. In the belief that the loop simulator circuit parameters define the d.c. power which a telephone line would supply a telephone set, PBX common equipment could be registered as supplying no d.c. current to the remote telephone sets other than current in the range specified for the loop simulator circuit. This result should be reached through implementation of paragraph 28 below, in specific rules.

26. *PBX and KT Installation Problems.* Unlike terminal equipment, which is generally connected only to the telephone network and to no other equipment, PBX and KT systems consist of common equipment which is directly connected to the telephone network, and remote terminal equipment (such as telephone sets) which is indirectly connected to the telephone network through the common equipment. If protective circuitry is employed at the point of connection with the telephone network, then no harm can result from improper installation of wiring between the common equipment and remote equipment. However, if protective circuitry is not connected between such intra-system wiring and the common equipment, and there is no protective circuitry at the point of connection to the telephone network, then the network is vulnerable to inadequate intra-system wiring, and improper installation of such wiring.

27. Wiring is passive. It cannot, of itself, generate any signals. It can, however, become connected with earth ground or power lines through inadequate insulation, or marginally adequate insulation and improper installation.

We have received no adequate proposals for certifying the installation of wiring. Thus, even if we were to make the leakage current requirements applicable to intra-system wiring (which would assure adequate insulation), there still would be no assurance of adequate separation from power lines at the time of installation of such adequately-insulated wiring. Thus, we are faced with a quandry; the common equipment may be perfectly acceptable without protective circuitry, and yet leave the telephone network vulnerable to the vagaries of installation of wiring connected with the common equipment.

28. Absent any positive recommendations for adequately addressing this problem in the scope of the FCC registration program, we shall simply recommend that (1) PBX and KT equipment be connected to the telephone network through protective circuitry at the point of connection with the telephone network which assures compliance with the hazardous voltage, longitudinal balance and leakage current requirements regardless of the design and installation of the common equipment and intra-system wiring (in which case, no further information concerning the design of the common equipment need be furnished, except as noted below); or (2) that such protective circuitry be located within the common equipment such that it is electrically in the path of all wiring between the common equipment and remotely-located equipment (such as telephones); or (3) PBX and KT equipment be connected to the telephone network through *fully* protective circuitry at the point of connection with the telephone network (in which case, there would be no limitation on the remote terminal equipment which might be connected through the intra-system wiring, except possibly for data equipment). In each of the first two alternatives (1) the common equipment may only be used with remotely located terminal equipment which itself is registered as conforming with the signal power requirements of Part 68, or which is connected to the remote end of the intra-system

wiring through registered protective circuitry, and (2) information would have to be furnished concerning the loop current furnished remote equipment, to determine whether equipment registered as conforming to the signal power requirements when connected to a loop simulator circuit would similarly conform to these requirements as connected with the loop currents furnished by the common equipment.

29. We would recommend that the Commission entertain positive recommendations for the registration of such equipment and wiring associated therewith, to preclude any unnecessary use of protective circuitry.

Conclusions

30. After reviewing the various arguments cited herein, we are of the view that no valid legal or technical basis has been advanced which would support the continued exclusion of main telephones, PBX and KT equipment from the scope of Part 68 of the FCC Rules. Such equipment has been connected to the telephone network since *Carterfone,* through connecting arrangements (telephone company-provided protective circuits), and Part 68 of the FCC Rules provides substantially equivalent assurance of nonharmful connection without the telephone company-provided connecting arrangements. Additionally, all of the conclusions of paragraph 16 of the First Report and Order are applicable to main telephones, PBX and KT equipment, and therefore the present requirement of connecting such equipment solely through telephone company-provided connecting arrangements is unlawfully restrictive of the customer's right to use the telephone network in a manner which is privately beneficial without being publicly harmful. Moreover, the present requirement of connecting such equipment solely through telephone company-provided connecting arrangements is unlawfully discriminatory for the reasons stated in paragraph 16 of the First Report and Order.

31. In addition, a registration program applicable to some equipment types, but not applicable to other equipment types, would appear to raise serious questions of discrimination between those subscribers who wish to connect harmless equipment within the scope of the registration program, and those subscribers who would wish to connect harmless equipment not included within the scope of the program. In the first case, the subscriber could, on notification to the local telephone company, just plug registered equipment into a jack. In the second case, the subscriber must adhere to the present tariff requirements which require a telephone company-provided connecting arrangement. At a bare minimum, the subscriber must wait for the connecting arrangement to be installed prior to using his equipment. The technical discrimination between equipment types is also serious. Anomolously, equipment which is presently within the scope of Part 68 (e.g., datasets, which are typically connected with commercial power sources) actually may present a higher potential for harm than does equipment which is presently excluded (e.g., main telephones, which are connected with no power sources other than the telephone network itself). Such discrimination can simply not be sustained on technical "harm" grounds.

32. The Part 68 technical requirements are applicable to main telephones, as they are presently applicable to extension telephones and the same instruments are used for both purposes.

33. The Part 68 technical requirements are applicable to KT and PBX equipment with some modifications. These modifications have been qualitatively described in the foregoing paragraphs and will not be repeated here. The specific proposed rules will follow the revised language of Subpart D of Part 68 which is expected to be arrived at as a consequence of AT&T's comprehensive January 22, 1976 filing, and the comments which the Commission receives

thereon, and the appropriate modifications of those rules to accommodate PBX and KT equipment which are described in the foregoing paragraphs.

34. The F.C.C. registration program, as applied to main telephones, PBX's and key telephone systems, is in the public interest, and with the modifications discussed herein, will provide appropriate asurance of non-harmful connection of these types of equipment to the nationwide telephone network. We recommend that main telephones, PBX's and key telephone systems be included within the scope of Part 68 of the F.C.C.'s rules.

RICHARD E. WILEY
Chairman
Federal-State Joint Board

Separate Statement of Commissioner Benjamin L. Hooks

In Re: Joint Board Recommendation (Docket 19528)

While not necessarily agreeing with all of the statements herein, I concur in the Joint Board's recommendation in view of the reasoning more fully set forth in my dissent in *Mebane Home Telephone Company,* 53 FCC 2d 473 (1975).

I believe the public interest demands that we thoroughly assess the future impact of our interconnection policies before further extension. At this point, we do not know how our policies will effect local and long distance telephone rates for the non-business subscriber, how overall quality of service and responsibility therefor will change with fragmentation, or whether our policies will have the effect of actually accelerating the decrease in the number of smaller, independent telephone companies (now numbering about 1600 with approximately 20% of the nations telephones) and increasing the share of the large telephone companies if that is a concern.

In view thereof, the Joint Board proposal would not only appear to be appropriate under legal precedent, but represents one aspect of the cautious and well studied approach necessary to effect a thoughtfully structured policy of competition, a policy latterly propounded by the FCC.

The minority has suggested that this proceeding, technical in nature, is not the appropriate place to examine other public interest considerations. But that misses the point; the point is to defer action pending a decent understanding of the effects of any economic dislocation and such ameliorative measures as are warranted. Moreover, the contention that immediate application of registration will, at least, prevent technical harm is not persuasive since present connecting arrangements now serve that purpose, as they have for many years.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1676

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION and CONTINENTAL TELEPHONE CORPORATION, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

Petitioners respectfully submit this brief reply to the "Brief for the Federal Respondents in Opposition."

The effort of Federal Respondents to portray this case as but an insignificant incident in the implementation of a long-established statutorily and judicially approved Federal policy demonstrates a remarkable ability to disregard or distort both fact and law.

I. THE CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

At the inception of the proceeding below, a proceeding that for over four years occupied the time of the Federal Communications Commission, State commissions, several dozen non-Government parties, advisory committees and consulting research organizations, involved the expenditure of millions of dollars, and the compilation of a record of tens of thousands of pages, the FCC specified the basic issue as whether there should be ". . . *a basic and substantial change*" in the nature of "interstate and foreign message telephone service (MTS) and wide area telephone service (WATS) which would permit customers to furnish part of those services"[1] (emphasis supplied). Additionally, in a related case, the FCC deferred action on a complaint by a telephone instrument supplier because the relief suggested, *i.e.*, substitution of the supplier's telephones for those furnished by telephone companies, would necessitate "a basic and substantial change" in the nature of "message telephone service."[2]

It is precisely that *basic and substantial change*, not an insignificant incident, that would be ordered by the FCC's telephone equipment registration plan now before the Court. Indeed, the court below recognized, "the special and novel circumstances of this case, which implicates significant state and federal interests . . ." (Pet. App. 12a).

Petitioners have shown that this case has staggering practical ramifications, involving as it does every one

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[1] *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539 (1972).

[2] *Western States Telephone Company* v. *AT&T*, 19 FCC 2d 1068 (1969).

of the over 160,000,000 telephones and other items of terminal equipment in use on this nation's telephone network, each of the nation's over 1,600 telephone companies and each of their millions of customers, each of the 50 state utility regulatory bodies, and hundreds of millions or ultimately billions of dollars in increased telephone rates.[2]

Given the Commission's own view of its proceeding, the long history of the case, the lower court's recognition of the circumstances of this case and the significance of the interests involved, together with petitioners unrebutted showings, for Federal Respondents to now characterize the case as of little if any import is at best a distorted view, if not wholly at odds with reality. The issues are significant and substantial. The impact is severe and widespread. We submit that the case is clearly cert-worthy under basic certiorari criteria.

II. FEDERAL RESPONDENTS HAS MISSTATED COMMISSION PRECEDENT.

With the Commission's decision admittedly and obviously representing "a basic and substantial change" in its so-called "interconnection policy," the implication is clear that Federal Respondents' string citation (p. 18, n.19) of prior FCC decisions, allegedly reflecting long established Commission policy, is faulty. The fault need not be left to implication, however, for review of the cases themselves clearly demonstrates their inapplicability to the case at bar.

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[2] Federal respondents have chosen to ignore this economic impact (as did the FCC), electing instead to focus on first year "compliance cost" (p. 8) of *only* $94 million (for AT&T), an amount termed "minimal" and "relatively inexpensive" (*Ibid.*).

In *Recording Devices*,[4] for example, the FCC conclusion was:

> "Accordingly, State and other local regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls."[5]

In *Jordaphone*,[6] the Commission concluded that interstate tariff restrictions were unlawful—

> ". . . in any community or state in which the use of such answering device with respect to intrastate or exchange telephone service is authorized by appropriate local or state regulatory agencies or commissions."[7]

Federal deference to State regulation in these cases stands in sharp contrast to the massive Federal preemptive effort in the instant case. Moreover, review of the other cited cases shows total lack of support for any claim of 30 years of consistent Federal regulatory practice and policy. *AT&T (TWX)*,[8] *Department of Defense* v. *Gen. Tel.*,[9] and *DOD* v. *AT&T*,[10] for example, had nothing whatever to do with Federal interconnection policy. Each case in fact involved Federal regulation of *rates for* what were found to be

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[4] 11 FCC 1033 (1947).

[5] *Id.* at 1047.

[6] 18 FCC 644 (1954).

[7] *Id.* at 671.

[8] 38 FCC 1127 (1965).

[9] 38 FCC 2d 803 (1973).

[10] 38 FCC 2d 819 (1970).

interstate services. Indeed, as the court below acknowledged,

> "It is true that most practices regarding terminal equipment have historically been regulated by the states, and that the FCC has always formulated its decision in terms of equipment used for 'interstate communication.'" [11]

Katz [12] and *Fallon* [13] are equally inapplicable. *Katz* was a case involving tariff regulations prohibiting use of interstate telephone service for unlawful purposes; and *Fallon* was a complaint against a telephone company for delay in installing equipment (the complaint was dismissed). Neither case related in any way to customer provided terminal equipment or interconnection.

In *Railroad Interconnection,* [14] the proceeding was terminated on the filing of tariffs allowing connection of right-of-way companies' communications systems to the interstate telephone network in cases of safety emergencies, or in cases of calls where prompt action was needed for continued railroad operation. The case hardly suggests a policy allowing unlimited interconnection of customer provided terminal

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[11] Pet. App. 20a.

[12] 43 FCC 1322 (1953).

[13] 14 FCC 2d 972 (1968).

[14] 32 FCC 337 (1962). In this case, the Commission expressly declined to find the tariff filing just and reasonable, just as it did several years later in regard to the post-*Carterfone* tariffs (15 FCC 2d 605 (1968)). That tariff filing by AT&T from which Commission approval was specifically withheld can now be said by Respondents to represent expressions of Commission policy is patently absurd.

equipment. The oft-cited and heavily relied on *Hush-A-Phone*[16] case is of interest on two points: 1) it involved only attachment of an inactive cup-like device to the telephone mouthpiece, not customer-provided communications equipment; and 2) the "privately beneficial but not publicly detrimental" use of the telephone (not replacement of it) concept originated with the court in reversing the Commission's decision prohibiting use of the device.[16]

Least persuasive of consistent policy of the cited cases is *Mebane,*[17] for that FCC seriatim decision, first reached on the ground that the Commission did not understand the meaning of the phrase "the telephone system" secondly, on the theory that Mebane's economic injury was speculative, and finally on a finding that loss of customers by Mebane was expected, contains the clearest and most explicit acknowledgement of a complete and major change in FCC interconnection policy that the English language could convey. There the Commission acknowledged that its *Carterfone* decision and its *Carterfone* policy involved attachments to, not customer replacement of or substitution for telephone company equipment. Thus, in the Commission's words,

> "As we see it, however, the basic question raised by AT&T's tariff filing on behalf of Mebane is not only whether such filing is consistent with *Carterfone* as described above, but also whether any public interest reasons *now* exist for the applicability of our customer interconnection policy

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[16] 22 FCC 112 (1957).

[16] 238 F.2d 266 (D.C. Cir. 1956).

[17] 53 FCC 2d 473 (1975).

> to depend on a distinction between interconnection devices which may constitute a substitution for telephone system equipment . . . and other interconnected devices such as the *Carterfone* device." [18]

Citing *Hush-A-Phone*, the Commission concluded:

> "We see no reason why this broad principle should not extend to interconnected devices such as PBX's (sic) and key systems which may replace telephone system equipment." [19]

Thus, because the Commission saw "no reason why not," its interconnection policy was changed in 1975 from permitting the Hush-A-Phone cup and the Carterfone attachment to allowing a wholesale replacement of telephone company equipment.[20]

Thus it is clear from the Commission's own words, in contradiction of those of its advocates, that its 1975 actions in *Mebane* and in *Interstate and Foreign MTS and WATS* (the case below) represented a drastic, far reaching change in policy, not a continuation of 30 years of consistent administrative policy as now suggested to this Court.

III. FEDERAL RESPONDENTS HAVE MISCONSTRUED JUDICIAL PRECEDENT AND LEGISLATIVE HISTORY.

Just as Federal Respondents have misstated both the significance of the issues in this case and the Com-

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[18] 53 FCC 2d at 476.

[19] *Id.* at 477.

[20] Clearly this was not FCC policy in 1973 when then Chairman Burch advised Congress that the Commission "lack[s] primary jurisdiction over telephone sets . . . " (119 Cong. Rec. 30962).

mission's own precedents and policies, so too have they misconstrued judicial precedent and the legislative history of the Communications Act of 1934.

Being wholly unable to cope with the statutory language used by the Congress, *i.e.*,

> "*Nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) . . . facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier" [21] (emphasis supplied).

Federal Respondents take refuge in a statute of their own enactment. What Congress intended to say, the argument goes, was that there would be no Federal jurisdiction over facilities *solely, exclusively,* or *purely* used in intrastate communication service.[22]

That there is no support in the legislative history of the Communications Act for this amendment by advocacy is obvious from the failure of Federal Respondents to support the argument by even a single citation. Moreover, this unsupported, 43 years after the fact, argument simply flies in the face of expressed Congressional language and intent; and in addition, imputes to the 1934 Congress a complete lack of knowledge of the facts of telephone system operation, an imputation clearly and completely refuted by the Act's legislative

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[21] Communications Act of 1934, Sec. 2(b)(1); Pet. App. 1h-2h.

[22] Respondents' Brief, pp. 3, 21. Having thus amended the statute to their own liking, Federal Respondents suggestion that the burden is now on petitioners to persuade the Congress to legislate a change in FCC policy (p. 13) approaches the height of bureaucratic disdain.

history. As best and most succintly put by the Commission itself,

> "When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate communication merely because of the circumstances that every telephone can be connected with a toll line for interstate calls. . . . Congress agreed with the USITA position that 'the tail should not wag the dog;' that their [independent telephone company] telephone facilities should remain under State regulation because they were essentially local. . . ."[25]

To say now, as do Federal Respondents, that the telephone is an instrumentality of interstate communication and therefore subject to Federal preemptive jurisdiction because the telephone is not used exclusively in intrastate communication is a flat contradiction of Congressional intent and an aspersion on Congressional intelligence. The Congress in 1934 well knew the facts of telephone life, and with that knowledge enacted a statute that plainly says *nothing* shall confer Federal jurisdiction over facilities used for or in connection with intrastate and exchange communication.

Congressman Rayburn clearly understood the meaning of the word "nothing." The Communications Act of 1934, in his words, does "not apply to a telephone receiving set, or anything else like that."[26]

In 1973, then FCC Chairman Burch also clearly understood what "nothing" meant. In his words, the Commission "lack[s] primary jurisdiction over tele-

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[25] *General Telephone of California*, 14 FCC 2d 693, 696 (1968).

[26] House Hearings, H.R. 8301, 73d Cong., 2d Sess. 179 (1934).

phone sets which are a primary part of the facilities used in providing exchange telephone service."[25]

And this Court experienced no difficulty in summarily disposing of a similar Federal contention in these words:

> "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety and in the usual sense."[26]

Federal Respondents difficulty in translating "shall not" to read "shall" appears to be responsible for yet another diversionary effort, *i.e.*, the contention that Federal jurisdiction over local telephone facilities must exist because the Congress conferred on the FCC limited regulatory authority over "connecting carriers" participation in interstate communication."[27] This contention is wide of the mark, however, for the statutory language conferring this limited jurisdiction quite clearly limits it to the interstate service of otherwise wholly exempt carriers; the proviso in no way purports to qualify the exclusion from Federal jurisdiction of intrastate *facilities of all carriers* contained in Section 2(b)(1) of the Act.[28]

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[25] 119 Cong. Rec. 30962.

[26] *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 528-529 (1945).

[27] Respondents' Brief, p. 14. These are the so-called Section 2(b)(2) companies, who engage in interstate communication solely through interconnection with another, unaffiliated company.

[28] Pet. App. 1h-2h.

In advancing this contention, moreover, Federal Respondents choose to ignore the inapplicability of Section 214 of the Act (47 U.S.C. 214),[29] the only statutory provision under which any facility authorization from FCC is required, to the connecting carriers. Connecting carriers may construct or operate any facility, other than an exclusively interstate line, without FCC involvement. Thus the connecting carrier argument, rather than being supportive of Federal Respondents' innovative approach to statutory construction, substantially undercuts it.

In sum, as petitioners in this case have shown, the Congress in 1934 was aware of the integrated operation of the telephone network. It sought to protect and preserve then existing State jurisdiction over local facilities and services by enacting Section 2(b)(1). In Section 221(b) it sought to exclude from Federal jurisdiction, *even interstate facilities and services,* where by geographical happenstance those facilities and services extended across state boundaries but performed local exchange functions.[30] Twenty years later, another Congress amended both Sections 2(b) and 221(b) to insure that use of radio facilities by telephone companies would not subject intrastate and local facilities and operations to Federal jurisdiction.[31]

Indeed, the entire Congressional history could not have more clearly established the Federal legislative purpose of creating, for the first time, effective Federal

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[29] Pet. App. 10h-12h.

[30] Contrary to Federal Respondents "surplusage" argument, Section 221(b) is necessary (in addition to Section 2(b)(1)) to protect State jurisdiction over, *inter alia,* exchange rates that are interstate in nature and hence not protected by Section 2(b)(1).

[31] 68 Stat. 63, 64.

regulation of interstate and foreign communication, while at the same time preserving intact and untouched the State regulatory authority over intrastate and local matters that in 1934 had been in existence for some 30 years. Congress sought neither displacement of State regulatory authority, nor a Federal-State conflict or overlap. It sought, and its statute clearly achieved, to simply fill a regulatory gap—regulation of interstate and foreign communications.

Federal Respondents' description of the state of the law in the courts follows the pattern of treatment accorded facts, issues, Commission precedent, and statutory construction. The recurring and expanding jurisdictional dispute is ignored, as is the substantial disagreement within the courts that have considered the issue."[32]

California v. *FCC*,[33] for example, in Federal Respondents' view, marks the first time the District of Columbia Circuit "thoroughly considered" the jurisdictional issue. The jurisdictional issue was indeed thoroughly considered in *California*, but in the dissenting opinion of Circuit Judge Robinson, not in the court's brief *per curiam* majority opinion.

Similarly, Federal Respondents would dismiss *Kitchen*,[34] a case in which the D.C. Circuit did indeed

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[32] Respondents tend to ignore the uncertainty expressed by the First Circuit, as well as the in-depth dissents in the Fourth and D.C. Circuit cases.

[33] C.A. D.C. Cir. No. 75-2060, June 20, 1977.

[34] 464 F.2d 801 (D.C. Cir. 1972). Federal Respondents "dictum" label is based on what FCC argued in the case, not what the court decided. The court's opinion specifically assumed *arguendo* that Section 214 applied and held that "jurisdiction would still be precluded by Section 221(b)." *Id.* at 803.

thoroughly consider the jurisdictional issue, by the self-serving characterization of that portion of the court's opinion with which Federal Respondents disagree as "*dictum*" (p. 13, n.12); and by asserting, contrary to fact, that the facility involved (a telephone central office) had no effect on interstate communications. As the case itself shows, the *Kitchen* facility, like the telephone instrument, would handle interstate as well as local exchange calls. And again, Federal Respondents' attempt to distinguish *NARUC*,[35] another thoroughly considered D.C. Circuit jurisdictional case, on an asserted absence of interstate nexus, ignores the fact that the cable TV operations there involved utilized the same coaxial cable facility to transmit television programs, undeniably interstate in character.

In acclaiming *Puerto Rico*[36] as a case in point, Federal Respondents overlook two things. First, the *Puerto Rico* court specifically acknowledged that Sections 2(b)(1) and 221(b), "[r]ead literally, do appear to preclude"[37] Federal jurisdiction. The court's resolution of the jurisdictional issue, according to the court was "far from free of doubt."[38] Second, in reaching its uncertain decision on the jurisdictional issue itself, the *Puerto Rico* court carefully pointed out the factors which the Commission must consider in exercising its regulatory jurisdiction. In the court's words,

> "The FCC must determine whether a PRTC monopoly in this case will enhance the development of intrastate and interstate telephone service.

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[35] 533 F.2d 601 (D.C. Cir. 1976).

[36] 553 F.2d 694 (1st Cir. 1977).

[37] *Id.* at 698.

[38] *Id.* at 699.

> Against that finding must be balanced the asserted countervailing interest of telephone subscribers 'reasonably to use . . . telephone[s] in ways which are privately beneficial without being publicly detrimental.'"[39]

Throughout the instant proceeding before the Commission, before the court below, and before this Court, petitioners have consistently and repeatedly pointed out the total failure, indeed the outright and repeated refusal by the FCC, to perform the balancing of interests mandated by the *Puerto Rico* court.

IV. THE BALANCING OF INTERESTS REQUIRES CONSIDERATION OF ECONOMIC IMPACT.

In seeking certiorari in this case, petitioners have emphasized that involved is not only the fundamental question of Federal jurisdiction itself, but also the grievous flaw in the Commission's exercise of that claimed Federal jurisdiction by prescribing a nationwide terminal equipment registration program without considering the economic impact of its action on telephone company ratepayers.[40]

Whether the FCC correctly opined that AT&T's $94 million first year "compliance cost" is "minimal" may be subject to debate. The crucial fact, however, is not telephone company compliance cost, but the economic impact on millions of telephone company ratepayers through a widespread shift to customer-

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[39] *Id.* at 701.

[40] Paradoxically, although the Commission promulgated its equipment registration program without consideration of its economic impact, it appears to have requested additional economic data from Puerto Rico Telephone Company prior to taking final action on a request for waiver of that program. *Ibid.*

provided telephone terminal equipment, a shift that would obviously be encouraged and facilitated by the FCC registration plan. The truth of the matter is that never in its history to date has the FCC conducted a study of the economic impact of its terminal equipment interconnection policies, and the Commission itself has repeatedly so stated.

In *Carterfone,* a case which involved only an attachment to the telephone network, not customer replacement of critical elements of that nework, the Commission acknowledged that it had no occasion to address the economic impact issue. It did recognize, however, that "economic effects upon the carriers rate structure might well be a public interest question," one to be weigh[ed] against the benefits of interconnection.[41] Again, the issue of the economic impact of the registration program proposed by FCC in this proceeding was, according to then Chairman Burch, "integral to a fair resolution" of the proceeding.[42]

Despite this continuing judicial and administrative understanding of the need for balancing the several public interest factors involved in these FCC proceedings, what did the FCC actually do?

In the case at bar, the Commission proclaims that "The present decision related *only* to the requirements which interconnected devices must satisfy in order to avoid technical harm to the telephone network." [43] The FCC emphasized that "From its inception, Docket No.

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[41] 14 FCC 2d at 573.

[42] App. 9a-10a.

[43] Pet. App. 14b.

19528 has been concerned solely with the issue of technical harm." [44]

The first fact is, then, that the Commission has never determined the economic impact of its interconnection policy, either as enunciated in *Carterfone* (attachments) or as significantly revised and expanded here (replacements). The second fact is that recently the FCC has announced its recognition of the fact that a significant shift to customer-provided terminal equipment "could work to the detriment of the independent telephone industry," [45] and has instituted a proceeding to determine what action might be taken "to ameliorate or avoid any adverse revenue consequences. . . ." [46]

Thus the Commission's own orders in the instant case, together with its subsequent actions, sharply contradict its advocates' theory on brief that the Commission has given proper and adequate consideration to the economic effects of the Commission's actions in the case at bar. In short, FCC admittedly gave no consideration to economic impact in *Carterfone* and refused to do so in the case at bar; but belatedly, and to this moment ineffectually, has now determined that its earlier promised consideration of economic impact should be initiated. Thus even were Federal Respondents correct in contending that petitioners "economic

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[44] Pet. App. 7c. This preoccupation with "technical harm" was so incredibly intense that the Commission disclaimed any responsibility for whether FCC certified equipment would work. That, according to FCC, is a risk assumed by the customer! (Pet. App. 11c).

[45] *Customer Interconnection*, 61 FCC 2d 766 (1976).

[46] *Customer Provision of Terminal Equipment*, FCC 76-1008, November 8, 1976.

concerns flow from the *Carterfone* interconnection policy" (Brief, p. 7), the fact remains that the Commission's "basic obligation to consider fully all evidence bearing on the public interest in advance of taking regulatory action" has not been fulfilled; and "disinclination by the FCC . . . to 'revisit *Carterfone*' simply misses the point." [47] And Federal Respondents' assurances that the Commission plans to take an after-the-fact look at the consequences of its already taken action neither comports with legal requirement nor offers any degree of practical consolation.

In the face of in-depth studies projecting multi-billion dollar telephone rate increases from widespread substitution of customer-provided telephone equipment, the FCC is legally and rationally obliged to give consideration to the economic impact of its program *before* it implements it. This is what FCC failed to do and its failure is admitted by its own decision.

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[47] Pet. App. 40a-41a.

CONCLUSION

Certiorari in this case is clearly warranted, and indeed is required to resolve the substantial and controversial issues here presented. Federal Respondents' "Brief in Opposition" has totally missed or misstated the points at issue. For the reasons given here and in the petitions, certiorari should be granted.

Respectfully submitted,

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